containing this same class description. According to representations made by counsel for Gadson at the Fairness Hearing, "policy holders were given ample time to review the notice and make a decision as to whether or not they wanted to stay in the class or opt-out of the class or object." Further representations to the Trial Court by counsel for class plaintiff and former law partner of counsel for the class defendant were that for an individual to be entitled to the class relief, they must "verify their name and that they actually were a policy holder."

Prior to the Fairness Hearing and in accordance with the Notice that was sent to the class of insured persons, Jana Hutchinson, Sharon Henderson, Angela King, Valerie Askew, and Charles J. Kahn intervened and submitted their objections to the certification of this case as a class action. Among other reasons, they asserted that the class should not be certified, the Notice was defective, that the settlement was not "fair, adequate and reasonable," that the settlement terms incorporated "relief" that stood in violation of Georgia law, and that the named class representative was not an adequate representative for the putative class of persons affected by the settlement.

The Interveners provided the Trial Court both live testimony and an affidavit from Tim Ryles, the former Insurance Commissioner for the State of Georgia and the listed expert witness for the class Plaintiff in a competing Georgia lawsuit. Likewise, Interveners supplemented the materials submitted at the Fairness Hearing with an Order from the Superior Court of Cobb County, Georgia, wherein durational rating (part of the "relief" offered to the class members) was found to violate Georgia law.

After the "Fairness" Hearing of September 8, 2004, counsel for the proponents of this class action and counsel for interveners/objectors were each asked to prepare proposed orders for the Trial Court. On September 29, 2004, the Trial Court entered its Final Order (prepared by counsel for

the class plaintiff and defendants) approving the class action settlement and dismissing the case with prejudice. (App. D.) The Final Order, however, certified a very different class than was initially certified by the Trial Court and that was described in the Notice sent to prospective class members. In its Final Order, the Trial Court certified the following as a class:

> "all persons (including the named plaintiff) in Alabama or Georgia who at any time . . . purchased or renewed a certificate of group health insurance from United Wisconsin Life Insurance Company **that provided coverage to that individual and/or his or her family . . . .**" [emphasis added].

On October 6, 2004, Interveners filed a Motion for Reconsideration, and on October 26, 2004, filed a Motion to Alter, Amend, or Vacate. In compliance with Ala. Code § 6-5-642, Appellants/Interveners filed their appeal to the Alabama Supreme Court on November 9, 2004.

The day after Interveners filed their Notice of Appeal, describing, among other things, that one of the issues on appeal was the Trial Court's failure to conduct a rigorous analysis under Ala. Code § 6-5-641, the Trial Court, "without request" from any of the parties, entered an Order denying the Interveners' Motions and also memorializing an attempt to comply with the prescriptions of Ala. Code § 6-5-641. (App. C.) On July 6, 2005, the Alabama Supreme Court heard the appeal filed by Interveners and granted oral argument. At oral argument, counsel for class plaintiff for the first time since the inception of the Gadson case and contrary to the many representations made by counsel for plaintiff and even the class representative herself via affidavit, admitted that ***Vivian Gadson was not an insured of the class defendants;*** for the first time admitted that ***Vivian Gadson's health and claims history were never used*** to calculate insurance premiums; and admitted that the ***class definition had been changed.***

This new class definition was never mailed to any member of the purported class and there was absolutely no evidence that any member of the general public had had received any benefit from or had even been mailed this newly "Switched" class definition other than Vivian Gadson. Counsel for the class proponents never denied this fact.

Petitioners argued that this class action could never be properly certified because the class plaintiff lacked standing to assert claims included in the class action because she was never an insured of the defendants and thus there was not and could never be any "commonality" or "typicality" of the facts or claims of actual insured persons who were the real members of this class action. Furthermore, Petitioners expressly showed that the settlement itself violated many of the insurance laws and regulations of the state of Georgia. Despite this showing, which included a Georgia Superior Court opinion, state insurance regulations and opinions from both the current and former Commissioners of Insurance for the State of Georgia, the Alabama Supreme Court affirmed the Trial Court's certification of this class action lawsuit without opinion citing only Alabama Rule of Appellate Procedure 53(a)1 and 53(a)(2)(F); that an opinion in the case would serve no significant precedential purpose; and that the Court, after a review of the record and contentions of the parties, concludes that the judgment or order was entered without an error of law. On October 21, 2005, the Alabama Supreme Court denied Petitioners' Application for Rehearing and this petition follows.

## STATEMENT OF THE ISSUES ASSERTED TO MERIT THE GRANT OF CERTIORARI

I.

Whether a state court in a class action settlement, consistent with basic principles of federalism and the Due Process Clause of the Fourteenth Amendment, can exercise

jurisdiction over unnamed class members and their claims when: (1) the class representative has no standing to assert claims that are common or typical to members of a class; (2) the named class representative is not a member of the class, is not entitled to any relief proposed in the settlement and could not herself opt-out of the class thus making her inadequate to represent the class; (3) counsel for the class plaintiff and class defendants conspired and colluded to compromise the claims of the real class members; and (4) the class definition was switched after certification without informing the Court and notice of change was never mailed to any member of the subject class?

II.

Whether a state court in a multi-state class action, consistent with the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, Section 1 of the Constitution, can ignore the substantive law of another state whose citizens are included in the class when the transactions giving rise to the nonresidents' claims occurred in the non-forum state where the forum state has no connection and where it is expressly shown that the law governing the claims of the nonresidents is substantially different than the law of the forum state.

## ARGUMENT

### I. THE TRIAL COURT'S ASSERTION OF JURISDICTION OVER NONRESIDENT AND RESIDENT MEMBERS OF THIS CLASS ACTION EXCEEDS THE CONSTITUTIONAL LIMITS ON STATE COURT JURISDICTION ESTABLISHED BY THE CONTROLLING DECISIONS OF THIS COURT.

#### A. The Trial Court Ignored The Constitutional Standards Established By This Court Requiring Notice Before Exercising Jurisdiction Over Unnamed Class Members.

The decisions of this Court require that under the Fourteenth Amendment's Due Process Clause, in order for a state court to take jurisdiction over unnamed members in a class action lawsuit that it must provide minimal due process protections. These protections include, *inter alia*, that the absent class members be provided with notice of the pendency of the action and an opportunity to be heard. *Phillips Petroleum Co. v. Shutts*, et al., 472 U.S. 797 at 812; (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)).

Following this Court's precedents, the Alabama Supreme Court has stated that in order to comply with the requirements of due process, "what type notice, if any, is due in a class action depends on how the class is certified." *Taylor v. Liberty Nat. Life. Ins. Co.*, 462 So. 2d 907, 911 (Ala. 1984). Notice is mandatory only in class actions certified under Rule 23(b)(3). Fed. R. Civ. P. 23(c)(2). Thus, in order to afford absent plaintiffs due process protections, "[t]he plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel." *Shutts*, 472 U.S. at 812 (1985). The Court of Appeals for the Eleventh Circuit delineates what notice of a class action

should contain: "[s]urely the best notice practicable under the circumstances cannot stop with . . . generalities. It must also contain an adequate description of the proceedings written in objective, neutral terms, that, insofar as possible, may be understood by the average absentee class member . . . ." *Twigg v. Sears, Roebuck, & Co.*, 153 F.3d 1222, 1227 (11th Cir. 1998) (citing *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1103-1105 (5th Cir. 1977).) Where "the notices do not adequately inform an absent class member . . . that claims like his were being litigated or that they had been settled," the notice does not comport with due process. *Twigg*, 153 F.3d at 1229. (emphasis added).

In the instant case, the class action notice was mailed containing a class description of

> "all persons and entities . . . in Alabama or Georgia who, at any time purchased or renewed in Alabama or Georgia a certificate of medical insurance from United Wisconsin Life Insurance Company."

According to representations by counsel for class plaintiff at the Fairness Hearing of September 8, 2004, "policy holders were given ample time to review the notice and make a decision as to whether or not they wanted to stay in the class or opt-out of the class or object." This didn't actually happen.

After the Fairness Hearing, counsel for the proponents and counsel for the interveners/objectors were asked to prepare their respective proposed orders for the Trial Court. On September 29, 2004, the Trial Court entered its Final Order as submitted by class counsel approving the class action settlement and dismissing the case with prejudice. The Final Order, however, **certified a very different class than the class that was initially certified by the Trial Court,** described in the Notice sent to prospective class members, and submitted by the Plaintiffs and Defendants to the Trial

Court in their Stipulation of Settlement. In its Final Order, the Trial Court certified a class of persons consisting of:

> all persons (including the named plaintiff) in Alabama or Georgia who at any time. . . purchased or renewed a certificate of group health insurance from United Wisconsin Life Insurance Company **that provided coverage to that individual and/or his or her family. . . .**

(Emphasis Added.) Apparently, someone advocating for a settlement realized that Vivian Gadson did not have standing to bring this case, and that she was not, as had been long maintained by Petitioners, an individual with claims that were typical and common with those of the class. The proposed Order for Final Certification submitted by counsel for Ms. Gadson sought to correct this fatal flaw by secretly inserting a new class definition in an obvious effort to make Vivian Gadson "fit" into a class of persons who were never insured under the policy made the basis of this case. Presumably, this "substitution" was done without bringing same to the Trial Court's attention.

Even assuming *arguendo* that the covert switching of the new class definition was proper, there has been ***absolutely no due process*** in this case because potential class members received ***no notice*** of the new class definition. By secretly switching the class definition, class counsel completely abandoned any attempt to notify any absent class member (and intervenors) of the new definition. Now, even uninsured persons who do not now nor have ever owned or been insured under a policy of insurance with the class defendants, were now included in the class and their claims were being settled by a group of attorneys and a class representative who, without question, were not adequately representing the interests of the class as it was certified.

Indeed, Vivian Gadson is likely the only non-insured "family member" to reap any benefit from the settlement of this class action lawsuit that was erroneously certified by the Trial Court. Because there has been **zero** notice given to the potential members of this "new class definition," there has been **zero** due process afforded those individuals. Accordingly, the Trial Court abused its discretion in certifying this case as a class action. Similarly, by affirming the erroneous judgment of the Trial Court, the Court below overstepped its constitutionally permissible jurisdiction by failing to ensure that those Due Process considerations promulgated by this Court were followed.

### B. The Trial Court And The Court Below Below Ignored The Constitutional Standards Established By This Court Requiring Adequacy of Representation Before Exercising Jurisdiction Over Unnamed Class Members.

This Court has held that "the Due Process Clause requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Shutts*, et al., 472 U.S. 797 at 812; (quoting *Hansberry v. Lee*, 311 U.S. 32, at 42-43, 45; 61 S.Ct., at 118-119, 120 (1940)). In explaining the "adequacy" requirement, this Court has stated that "[a] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), (*citing East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403; 97 S. Ct. 1891, 1896; 52 L.Ed.2d 453 (1977) (*quoting Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216; 94 S.Ct. 2925, 2930; 41 L.Ed.2d 706 (1974))). Finally, precedent from this Court holds that, in the context of class action litigation, a court may only proceed to enter a decree binding all class members when the "the interest of those not joined are of the same class as the interest of those who are and where it is considered that the

latter fairly represent the former in the prosecution of the litigation in which all have a common interest." *Hansberry*, *infra*. at 41. If such a decree, as in the instant case, seeks to bind absent parties, Courts must look to whether the decree satisfies the requirements of due process and of full faith and credit. *Id*. at 42.

There can be no credible argument in the instant case that Vivian Gadson was an adequate class representative or that the Court below adhered to either the Due Process Clause or the Full Faith and Credit Clause and it was absolute error for either the Trial Court or the Alabama Supreme Court not to recognize as much and decline the certification.

In Vivian Gadson's complaints and before the trial court at the certification and fairness hearing, it was represented through Vivian Gadson's affidavit that she was a MedOne certificate owner and that, like the putative class members, her individual health and claims history were used to determine her premiums at renewal. Despite that she was served w/ a subpoena to appear at the fairness hearing, she failed to appear. Thus she would not provide any live testimony and the content of her affidavit was not subject to cross examinations. Not only did the so-called class representative allege that *her* insurance coverage was provided under Master Policy AB 2000, Client No. 2400-006178, she alleged that, like the putative class members, the Defendants were underwriting her policy on an annual basis "based upon **her** health and claim history and that [Gadson's] health and claim history were the main factors used to determine the amount of premium charged . . . ."

As evidence that this deception was no mere mistake, Vivian Gadson later amended her complaint, making these same allegations for the putative class members nationwide and once again representing and asserting that, like the putative class members, she too was a MedOne certificate owner, that her insurance coverage was provided under

Master Policy AB 2000, Client No. 2400-006178, and that her health and claims history were utilized to determine her premium at renewal. Indeed, Vivian Gadson's representation that AMS utilized her health and claims history in determining her premium rate, was the very argument the class proponents made to the trial court in "support" of their position that Vivian Gadson was an adequate class representative and that her claims were typical of those of the class members. Despite the fact that Vivian Gadson was never a MedOne certificate owner, was never an insured under any certificate of insurance issued by the class defendants, and despite the fact that AMS had never used her health and claims history to determine the amount of premium charged, Vivian Gadson amended her complaint not once, but a total of four times, each time making the exact same allegations. Indeed, even in her sworn affidavit, which was submitted by the class proponents to the trial court in "support" of certification, Vivian Gadson affirmatively represented that her insurance was still in affect.

We now know (as does the Trial Court and the Alabama Supreme Court) that these allegations are completely false. Early in the case, the class defendants filed a motion to dismiss plaintiff's nationwide class complaint, attaching a Certificate of Group Insurance showing "Jevon Gadson" and not Vivian Gadson as the applicant, insured, certificate owner and policy holder. Interestingly, absolutely no evidence was offered to the trial court at the certification and fairness hearing, or at any time previously, explaining this anomaly in Vivian Gadson's multiple pleadings and affidavit. Rather, the parties colluded to "hush" this information so that Vivian Gadson could continue to make the same false assertions, painting the fraudulent picture that, like the putative class members, she was a MedOne certificate owner and that, like the putative class members, she was an insured and that, like the putative class members, AMS had utilized her health and insurance claim history in determining her renewal premiums.

Despite the fact that AMS had provided documentation to plaintiff's class counsel conclusively establishing that Vivian Gadson, unlike the putative class members, was never a MedOne certificate owner and that her health and claims history were never utilized for any purpose by AMS, Vivian Gadson and her counsel continued to represent that (i) she was a MedOne certificate owner, (ii) that she was an insured of the class defendants, (iii) that the Defendants were underwriting her policy on an annual basis based upon her health and claims history, and (iv) that her health and claims history were the main factors used to determine the amount of premium charged. None of this was true with respect to Vivian Gadson.

### C. The Trial Court And Court Below Violated Its Own Precedent And The Precedent Of This Court When It Failed To Take Into Account Due Process Considerations Because Vivian Gadson Is Not An Adequate Class Representative In That She Does Not Possess Claims That Are Typical To Those Of The Class She Seeks To Represent.

Before both the Trial Court and the Alabama Supreme Court, the proponents of the class disregarded the fact: (1) that Vivian Gadson has continuously made false and unsupportable assertions in every pleading before the trial court; and (2) that Vivian Gadson has failed to offer ANY evidence that, like the putative class members, her health and claims history could have been utilized for any purpose whatsoever by the class defendants. Rather, the class proponents stubbornly clung to their assertion that, despite her false and fraudulent pleadings and affidavit testimony, Vivian Gadson was an adequate class representative despite her lack of standing.

Once Gadson's lack of standing was exposed, it was contrary to Alabama law, Georgia law and the precedents set

forth by this Court to conclude that Gadson was an adequate class representative for the putative class. Indeed, relying on principals set forth by this Court, the Court below has previously held that an individual may sue as a representative party "on behalf of all '***only if*** the claims of the representative parties are typical of the claims of the class." ***Ex parte EXIDE CORPORATION***, 678 So.2d 773 (Ala. 1996). In ***Ex parte EXIDE***, plaintiff's counsel sought to certify a class action consisting of "[a]ll retail customers residing in the State of Alabama who since 1991 purchased used or previously sold Exide batteries which were sold and marketed to them as new, first quality Exide batteries." Plaintiff's counsel named as the proposed class representatives three individuals. However, just as in the present case, the class representatives failed to show that their claims were typical of the class. Specifically, the Alabama Supreme Court below found that, even though the representatives had purchased Exide batteries, they failed to show that they had in fact purchased "used or previously sold Exide batteries that were sold and marketed to them as new, first-quality Exide batteries." As such, the Court below held:

> The named plaintiffs bore the burden of proving each of the four prerequisites of Rule 23(a). *Rowan v. First Bank of Boaz*, supra. They, at least, did not prove that their claims were typical of the claims of the class they sought to represent. Therefore, the trial court abused its discretion in certifying the class.

*Id.* It is important to note that, just as in the present case, the proposed representatives in ***Ex parte Exide*** did "assert" that their claims were typical of the putative class member's claims; however the evidence simply did not bear that out. The present class proponents make the same fatal flaw as the class proponents made in ***Ex parte Exide***. The claims of the present putative class members are that the Class "Defendants fraudulent[ly] [sic] concealed and failed to disclose that Defendants were underwriting Plaintiff's policy on an annual

basis based upon her health and claim history and *Plaintiff's health and claim history* were the main factors used to determine the amount of the premium charged to the Plaintiff," and that "Premium rates were based on *Plaintiff's health and claim history* at each renewal period." However, just as the proposed class representatives in ***Ex parte Exide*** failed to show that they had purchased "used" instead of new batteries, the present class proponents have failed to offer any evidence showing that the Defendants *ever* underwrote the subject policy on an annual basis based upon Vivian Gadson's health and claim history; nor have they offered any evidence showing that Vivian Gadson's health and claim history were factors, *at all* - much less the main factors, used to determine the amount of the premium allegedly charged to the plaintiff.

The reason for their failure is clear: unlike the putative class members, Vivian Gadson was not a MedOne certificate owner or policy holder. Therefore, unlike the putative class members, the Defendants could never have underwritten the subject policy on an annual basis based upon Vivian Gadson's health or claim history.

The class proponents bore the burden of proving each of the four prerequisites of Rule 23(a), and the courts cannot evade these prerequisites by turning a blind eye to these shortcomings. Just as in ***Ex parte Exide***, the trial court erred in certifying the class and the Court below violated the Due Process protections afforded the unnamed members of this class action by affirming the certification.

### D. The Trial Court Violated The Due Process Clause In Certifying This Class Because Vivian Gadson Is An Inadequate Class Representative As She Could Never Be A Member Of The Class She Undertook To Represent.

As further proof that Vivian Gadson is not an adequate class representative, this Court should note that the pro-

ponents of the class failed to present any evidence that Vivian Gadson would have even received notice of the proposed class had she not sought to be the class representative. According to the Order accepting the stipulation of settlement, AMS was required to send notice by direct mail to "all persons who, after reasonable review of company records, hav[e] [sic] been identified by defendants as being possible members of the settlement class, at the most recent addresses reflected in such company records." An extensive review of the of record before the Court below fails to show *any* company record or document of any sort containing Vivian Gadson's name or address. Again, this is because, unlike the putative class members, Vivian Gadson was never a MedOne certificate owner and was never insured under any certificate of insurance issued by the class defendants.

Moreover, as additional evidence that Vivian Gadson was never an adequate representative and indeed never a member of the subject class, it is important to note that even if she would have received notice that there was a class action pending, Vivian Gadson would not have met the definition of a class member and, strangely enough, would not have been entitled to relief under the class settlement. Indeed, as represented to the trial court during the certification and fairness hearing by counsel for the class plaintiff and former law partner of counsel for AMS, for an individual to be entitled to the class relief, they must "**verify their name and that they actually were a policy holder**." Thus, by their own admission, because Vivian Gadson would not be able to verify that she was actually a policy holder, she would not be entitled to relief under the class, making her an inadequate class representative because she was never eligible to be a member of this class action.

Moreover, had she received notice of the pending class and wrongly thought that she was a class member, she would have quickly learned that she would not have even been eligible to opt-out from the class. Why not? Because, con-

trary to the class proponents arguments regarding their so-called class representative, folks like Vivian Gadson were never contemplated by the class proponents as being class members.

According to one of the counsel for the plaintiffs' class, as it relates to the class notice, "policy holders were given ample time to review the notice and make a decision as to whether or not they wanted to stay in the class or opt-out of the class or object." Assuming one actually were to meet the definition of class member, that individual could opt-out of the class only by following the opt-out procedure agreed to by the class proponents. However, according to the opt-out procedure, the actual certificate owner must personally sign the opt-out form to effectuate an opt-out; the opt-out procedure further specifically states that the opt-out form could not be signed by a representative.

> **If you fit the above description of class member, you have a choice whether or not to remain a member of the class on whose behalf this lawsuit is being maintained . . . if you want to be excluded from the class, you must complete the enclosed form (attached hereto).**
>
> **Such request shall contain** your group policy number, social security number and **the original signature of the certificate owner rather than of a representative.**

(Opt-out notice).

Again, Vivian Gadson was not a MedOne certificate owner; unlike the putative class members, she was never a certificate owner. As such, she could not sign the opt-out form and, thus, could not effectuate an opt-out. By their own admission, if she could not opt-out, she did not meet the definition of a class member. Because Vivian Gadson was never a MedOne certificate owner, and because her individual health and claim history was never used by AMS for any purpose, she is simply not an adequate class representative.

The Court below violated this Court's holding in *Shutts* and the Due Process rights of the unnamed class members in this case by failing to require an adequate representative before exercising jurisdiction over their claims.

### E. The Trial Court Failed To Adhere To Due Process Considerations For The Absent Class Members Because The Putative Class Representative, Vivian Gadson, Lacks Standing Under Alabama Law.

This Court has recognized that "[o]ne of the prudential limits on standing is that a litigant must normally assert his own legal interests rather than those of third parties. *Shutts*, 472 U.S. 797, 804. Of course, standing is usually determined by the law of the forum state. In the instant case, the class representative could never have standing in either of the states that were encompassed in this class action lawsuit. By affirming the certification of this class, the Court below violated the due process protections afforded to all persons included in this class by allowing an individual to serve as a class representative who neither had a case or controversy under the laws of the state of Alabama or Georgia.

Vivian Gadson enjoyed no privity, or contractual relationship, with AMS. Vivian Gadson never applied for health insurance with AMS, nor is there evidence that she did so on behalf of anyone else. Unlike the putative class members, AMS could not have used Vivian Gadson's individual health status or claims experience as a basis for imposing increases to her renewal premiums. Someone who is not insured cannot serve as a class representative on behalf of persons who were. *Farm Bureau Policy Holders and Members v. Farm Bureau Mutual Ins. Co. of Arkansas*, 984 S.W.2d 6, 15 (Ark. 1998)("We fail to understand, however, how Lee as class representative can raise an issue on behalf of the class which pertains to insurance coverage that he did not have.").

At the Court below, the class proponents asserted that it is enough to establish standing that Vivian Gadson paid ***some*** of the premiums (how much and how often, we do not know) for her son Jevon Gadson. Notably absent from this case is any averment, allegation or proof that Vivian Gadson stands for her adult son, Jevon, in any representative capacity whatsoever. Also absent from the Trial Court's findings of fact which was implicitly adopted by the Alabama Supreme Court is any finding of such representation of Jevon by Vivian Gadson. Under these circumstances, Alabama law does not recognize Vivian Gadson as an authorized party in order to allow her to maintain a suit regarding these matters. *See National States Insurance Co. v. Jones*, 393 So.2d 1361 (Ala. 1980)(allowing standing where plaintiff pled and proved that she was responsible for her aunt's medical expenses and where plaintiff sued as administratrix of her aunt's estate); *see also North Carolina Mutual Life Ins. Co. v. Holley*, 533 So.2d 497 (Ala. 1987)(allowing standing where plaintiff proved that she was the named beneficiary of a life insurance policy issued on the life of her daughter).

Again, Vivian Gadson was not insured by AMS nor was she legally authorized to present a legal claim on behalf of her adult son, who was. There is neither allegation, nor proof, that would allow the Trial Court or the Court below to take jurisdiction over a claim presented by Vivian Gadson, much less the claims of the thousands of unnamed class members to this case.

## II. THE TRIAL COURT AND THE COURT BELOW FAILED TO APPLY THE CORRECT LAW TO THE CLAIMS OF THE NON-RESIDENT MEMBERS OF THIS CLASS ACTION EXCEEDS THE CONSTITUTIONAL LIMITS ON STATE COURT JURISDICTION ESTABLISHED BY THE CONTROLLING DECISIONS OF THIS COURT.

### A. The Trial Court Failed To Adhere To Due Process Considerations And Violated The Full Faith and Credit Clause Since Gadson Lacks Standing Under Clearly-Established Substantive Law of the State of Georgia, Which the Trial Court Failed to Consider as Required by *Phillips Petroleum v. Shutts*

Had Gadson sued in Georgia, Georgia law would demand dismissal of her claim. Even overlooking the important differences between life insurance policies and health insurance policies, Georgia law ***only*** recognizes a personal representative, (i.e. executor or administrator), as a proper, non-contracting, party plaintiff. *Meriwether v. Metropolitan Life Ins. Co.*, 162 S.E. 421 (Ga. App. 1932) (only insured's legal representative could sue on life policy). In contrast to Alabama law, Georgia law regards payment of premiums as immaterial to a finding of sufficient legal standing. *Id.* For instance, in *Cooler v. Metropolitan Life Ins. Co.*, 3 S.E.2d 462 (Ga.App. 1939), the Georgia Court of Appeals of Georgia held an insured's husband, who was not a beneficiary, was not entitled to maintain suit on a life policy. Even though he had paid premiums on it, the Georgia court held he could not recover on the policy unless he was the named executor or administrator. *See also Simmons v. Metropolitan Life Ins. Co.*, 7 S.E.2d 824 (Ga.App. 1940) (insured's sister could not maintain suit for life insurance policy where she did not show that she was proceeding in capacity as either executrix or administratrix).

Following *Phillips Petroleum v. Shutts*, the trial court and the Court below were bound to evaluate the claims of the Georgia class members in terms of Georgia's substantive law. Because Georgia law does not recognize claims against insurance policies on behalf of non-parties to the insurance contract (except for those by duly-authorized legal representatives,) Georgia law would not recognize a claim by a stranger, like Gadson, to the contract. Had Gadson been in a Georgia court, her case would have been dismissed for lack of standing. This exposes the error in the decision of the Court below. Indeed, it is inexplicable how the courts below could have affirmed such an error. Without question, the Alabama Court failed to follow the constitutional considerations set out in *Shutts* when it failed to consider the law of the nonresident class members in certifying this class action lawsuit.

The importance of issuing this certiorari would resolve the obvious conflict between the precedents set forth by this Court, the Georgia Supreme Court and ruling by the Court below. the fact that this case was even certified without a representative who had legal standing essentially abrogates the clear precedents set forth by this and many other courts. To not issue a certiorari in this matter would allow state courts to completely ignore the Full Faith and Credit Clause of the U.S. Constitution and the precedents set by this Court.

### B. The Trial Court Failed To Adhere To Due Process Considerations And Violated The Full Faith and Credit Clause By Approving An Illegal Settlement Thereby Ignoring The Substantive Law of the State of Georgia, Which is Required by *Phillips Petroleum v. Shutts*

Although the United States Supreme Court's opinion in *Shutts v. Phillips Petroleum* paved the way for extra-territorial class actions in state courts, so long as the standards of personal jurisdiction were satisfied, *Shutts* does not authorize state courts to foist one state's substantive law onto another state's citizenry in the name of class action "justice." *Shutts*, 472 U.S. 797 (1985). To the contrary, the United States Supreme Court has held that state courts must beware applying state laws where those state laws are (1) substantive, rather than merely procedural and (2) conflict with the substantive state law of the absent class members' state. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730-31 (1988) (holding such action runs afoul of the Full Faith and Credit Clause and violates Due Process).

Certainly, Georgia insureds harbor a reasonable expectation that their claims against the Defendants should be governed by Georgia law. There exists a reasonable expectation, under either Georgia or Alabama choice of law rules, that the Georgia Class members' insurance contracts and tort actions would be governed by the strictures of Georgia law. *Gen. Tel. Co. of Southeast v. Trimm*, 311 S.E.2d 460, 461-462 (Ga. 1984) (observing that in contract actions, Georgia follows traditional rule applying law of the place where the contract was made); *Ex parte Owen*, 437 So. 2d 476 (Ala. 1983) (finding that Alabama follows traditional view that contract is governed by law of state where it is made).

The Alabama Settlement Agreement incorporates provisions that clearly violate Georgia law. Georgia's General Assembly prohibited the use of durational factors in calcu-

lating renewal premiums in the same breath that it banned the use of tier factors. O.C.G.A. § 33-30-12(d) ("Durations since issue and tier factors may not be considered."). Additionally, Tim Ryles, the former Insurance Commissioner for the State of Georgia and the expert witness listed by class plaintiff in her Rule 26 disclosures in this case, testified that durational rating is not permitted under Georgia insurance regulations.

The Alabama Settlement Agreement enshrines the prohibited concept of durational factor rating in two separate places. First, the Alabama Settlement Agreement incorporates a 10% durational factor in the calculation of the monetary relief under section B(1)(a). Second, the Settlement Agreement references "injunctive relief" that purports to notify Georgia consumers that in the future only durational factors, not tier factors, will be used to calculate renewal premiums. Exhibit F to the Settlement Agreement defines a durational factor by stating that "[a] durational factor is a percentage increase that is applied based on the length of time a policy has been in force . . . ." Only this Settlement Agreement would describe such a notice as "relief." Thus, not only do the pre-settlement practices of the insurer violate Georgia law, so too do the remedies incorporated into this settlement.

In this regard, the Alabama Settlement Agreement awards itself the dubious distinction of pioneering class action settlements that, under the guise of providing injunctive "relief," notify the purported Georgia class members that Defendants intend to substitute one illegal practice for another. To call Exhibit F "injunctive relief" uproots the term "relief" from its conceptual underpinnings. The Settlement Agreement redefines "relief" to secure a judicial ratification of Defendants' scheme to continue violating Georgia's law governing group health insurance. Clearly, the Court below exceeded its constitutional restrictions when it placed its stamp of approval on Defendants' attempt to merely trade one

illegal renewal rating methodology for another, as the Settlement Agreement is in violation of Georgia law.

As was expressly shown by Petitioners to the Court below and to the trial court, Georgia's General Assembly actually chose to prohibit the use of "durational" factors in calculating renewal premiums in the same stroke that it banned the use of "tier" factors. See O.C.G.A. § 33-30-12(d) ("**Durations since issue** [i.e., durational block-rating] and tier factors may **not** be considered."). Furthermore, as was expressly shown at the Court below, this Statute does apply to "one-life groups," such as the MedOne product at issue in this case. In fact, Ga. Comp. R. & Regs. 120-2-10-.12 (8)(a), provides that:

> One-life groups may also include other such arrangements as provided for in the Rules and Regulations of the Office of Commissioner of Insurance or at the discretion of the Commissioner.
>
> (b) All policies or certificates issued to one-life groups as permitted by this Rule shall comply with the requirements of O.C.G.A. Title 33, including Chapter 30.
>
> (c) All policies or certificates issued to one-life groups in this state on or before June 30, 1997, shall be deemed one-life groups and shall be subject to the provisions of this Rule, as well as all the requirements of O.C.G.A. Title 33, including Chapter 30.

Ga. Comp. R. & Regs. 120-2-10-.12 (8)(a).

As shown at the Court below, Georgia's Insurance Commissioner exercised his discretion, as provided for in these regulations, issuing two separate directives that speak specifically to the one-life group insurance products at issue in this case. First, the Georgia Insurance Commissioner, John W. Oxendine, on September 9, 1997 issued a Directive stating that "[o]ne-life groups . . . are subject to the portability, renewability and small group pooling laws as stipulated in Federal and State law." GA Directive 97-L&H-1

(emphasis added). Second, on February 22, 2001, Commissioner Oxendine further directed:

> It has come to my attention that some insurers may be in violation of Georgia's small group health insurance rating laws and regulations as it pertains to the development of group experience factors. As such, it is the purpose of this Directive to remind insurers writing small group health insurance in the state of Georgia that the use of health status, in any manner, for the development of group experience factors at renewal is prohibited pursuant to the provisions of Georgia Insurance Department Regulation 120-2-10-.12.

(GA Directive 01-EX-1)

Despite the class proponents arguments to the contrary, not only did Dr. Ryles testify regarding the above-stated Commissioner Directives, he specifically opined that the MedOne products were marketed and sold by the class defendants as one-life group products and that durational rating is not permitted under Georgia insurance regulations.

The class defendants attempted an evasive end-run around Georgia law by pointing out that the MedOne is sometimes sold to small employer groups and that these small group plans are not the subject of this class. However, this argument in no way diminishes the fact, when these products are not sold to small groups but rather are sold to individuals, the MedOne was sold in Georgia as a "one-life Group," and that, under Georgia law, one-life groups are subject to the same prohibition on durational rating.

At neither the trial court or before the Court below did the class proponents offer an expert opinion testimony to rebut the former Insurance Commissioner's opinion. In fact, neither of the class proponents offered any expert opinion, or case law, whatsoever in support of their position disregarding Georgia law. Furthermore, as was expressly shown to the Court below and to the trial court, in an Order from the

Superior Court of Cobb County, Georgia in the case of *Stephen and Ann Parker v. American Medical Security, Inc.*, a Georgia Court found that, as it relates to AMS's MedOne product, durational rating violates Georgia insurance regulations. Moreover, on March 31, 2005, the Supreme Court of Georgia issued a plurality opinion regarding AMS's appeal of the above cited Order. *See American Medical Security, Inc. v. Parker*, 612 S.E.2d 261 (Ga. 2005). The majority rendered its opinion on procedural grounds, holding that the Parkers lacked standing to bring an action in Georgia attacking this Alabama settlement. However, because the majority reached its conclusion on procedural grounds, the minority correctly stated that "the majority does not refute or otherwise challenge the trial court's finding about the illegality of the Alabama settlement." *Id.* at 268, minority opinion. In speaking to the very settlement made the basis of this case the minority further stated:

> The majority incorrectly refuses to acknowledge the harm sustained by appellees, both individually and in their representative capacity on behalf of the unsuspecting victims of the unconscionable settlement appellants negotiated in Alabama. Instead, the majority has grafted an inapplicable "standing" requirement into Georgia law that serves only to aid and abet collusive behavior by out-of-state litigants. Instead of affirming a Georgia court's duty to uphold this State's law and protect our citizens, the Majority empowers the stratagems of parties like appellants who would use class action litigation as a means of depriving Georgians of their legal right and remedies.

*Id.* at 270.

Thus, every insurance expert experienced with Georgia law, every Georgia Judge, and every Georgia Justice who has actually addressed this issue agrees with the Petitioners that it is violative of Georgia law to use durational rating in calculating relief for the putative class members. This point is

crucial, because, as it relates to the putative Georgia class members, the settlement cannot be effectuated without violating law unique to them, which was designed to offer Georgians certain protections unavailable to the putative Alabama class members. Specifically, the monetary provisions of the agreement include the following:

> (1) a sixty-seven percent (67%) refund of the amount class members paid in premiums as a result of their health status being considered to determine renewal premiums *less a 10% durational factor*

As such, the class settlement agreement and all orders from both the trial court and the Court below incorporate certain provisions that violate Georgia law and only serve to discount the relief offered with yet another illegal rating practice. Moreover, the inclusion of this prohibited rating practice evidences that Vivian Gadson is not an adequate class representative.

Despite having expressly shown that Georgia law applied to the claims of certain unnamed class members, both the trial court and the Court below ignored this showing and thus violated those constitutional protections set out not only in its own precedents, but in violation to those constitutional strictures handed down by this Court in *Shutts*.

## CONCLUSION

The Trial Court's certification of this Alabama/Georgia class action is riddled with inconsistency, inaccuracy and deceit. Though it is unlikely that Vivian Gadson truly knew and understood the misrepresentations made about her ability to pursue this action, the lawyers involved in this action certainly did—in fact, on recognition that the initial class definition was wholly inaccurate, it was secretly changed. But what of the Trial Court's and the Alabama Supreme Court's role in this matter? While the judiciary should naturally be able to rely upon statements and representations

by counsel, blind reliance must end in the face of undisputed evidence of impropriety and a serious challenge that prohibits a class representative's standing to pursue the case. Given the glaring irregularities, the Trial Court was simply wrong to disregard the evidence of collusion and the Alabama Supreme Court was unjust in rubber-stamping the approval of the class certification settlement.

Social attitudes reflecting a generally poor view of the efficacy of class actions and the lawyers who handle them are not well-served by decisions like the ones at issue here. The judicial process demands and needs more. Because the Alabama Supreme Court's *sub silentio* affirmance of the Trial Court's class certification decision so far departs the accepted and usual course of judicial and appellate proceedings, Certiorari is warranted to correct this manifest injustice.

Respectfully submitted this 19th day of January, 2006.

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# APPENDIX

**APPENDIX A**

IN THE SUPREME COURT OF ALABAMA

[Logo]

[Filed October 21, 2005]

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Appeal from Montgomery Circuit Court: CV-02-1601

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ANGELA KING *et al*

v.

VIVIAN GADSON

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ORDER

The application for rehearing filed in this cause is overruled.

LYONS, J.—Nabers, C.J., and *See*, Harwood, Woodall, Stuart, Smith, Bolin, and Parker, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 21st day of October, 2005.

/s/ Robert G. Esdale
ROBERT G. ESDALE
Clerk, Supreme Court of Alabama

## APPENDIX B

STATE OF ALABAMA JUDICIAL DEPARTMENT
THE SUPREME COURT
SPECIAL TERM, 2005

[Aug. 12, 2005]

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Appeal from Montgomery Circuit Court: CV-02-1601

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ANGELA KING *et al.*

v.

VIVIAN GADSON

---

LYONS, *Justice.*

AFFIRMED. NO OPINION.

*See* Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P.

Nabers, C.J., and *See*, Harwood, Woodall, Stuart, Smith, Bolin, and Parker, JJ., concur.

## APPENDIX C

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

[Filed Nov. 10, 2004]

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Civil Action No. CV-02-1601

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VIVIAN GADSON, individually and
on behalf of all others similarly situated,
*Plaintiff,*

v.

UNITED WISCONSIN LIFE INSURANCE COMPANY, *et al.*,
*Defendants.*

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ORDER

THIS MATTER is presently before the Court on the October 5, 2004 motion to reconsider and October 29, 2004 motion to alter, amend, or vacate, both of which were filed by Angela King, Valerie Askew, Jack Kahn, Jana Jutchinson, and Sharon Henderson ("Objectors/Intervenors"). In their motions, and through their various memoranda and other submissions offered in support thereof; the Objectors/Intervenors requested that this Court reconsider, vacate, alter, and/or amend its September 29, 2004 Order of Final Approval and Final Judgment of Dismissal With Prejudice as to the Settlement Class. The Court conducted a hearing on November 1, 2004, to address the Objectors/Intervenors' motions. During the hearing, after being given a full opportunity to present their arguments and after being offered the opportunity for a further evidentiary hearing to offer any additional evidence or submissions, counsel for Objectors/Intervenors declined in open court and on the record the

opportunity for any further hearing, withdrew their motion to reconsider and requested that the Court deny their motions.

Having duly considered all of the submissions and evidentiary materials presented, as well as the arguments of counsel for all parties and for the Objectors/intervenors, and this Court otherwise being fully advised and informed, the Court hereby amends, alters, modifies, supplements, and clarifies the September 29, 2004 Order of Final Approval and Final Judgment of Dismissal With Prejudice as to the Settlement Class as follows:

1. As the named parties in this case correctly assert, settlements of class actions are "highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits." *Bennett v. Behring Corp.*, 96 F.R.D. 343, 348 (S.D. Fla. 1982), *aff'd* 737 F.2d 982 (11th Cir. 1984) (quoting *Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 428 (5th Cir. 1977)); *see also In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986); 2 H. Newberg, *Newberg on Class Actions* § 11.41 (3d Ed. 1992).[1] Indeed, "[t]here is an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation as being most complex." *Access Now, Inc. v. Claire's Stores, Inc.*, 2002 WL 1162422, *4 (S.D. Fla. May 7, 2002) (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir.1977)). Thus, "[j]udicial policy favors voluntary settlement of class-action cases." *Gaddis v. Campbell*, 301 F. Supp. 2d 1310, 1313 (M.D. Ala. 2004) (citing

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[1] "'Because the Alabama Rules of Civil Procedure were patterned after the Federal Rules of Civil Procedure, cases construing the federal rules are considered authoritative in construing the Alabama rules.'" *Funliner of Alabama, L.L.C. v. Pickard*, 873 So. 2d 198, 207 n.7 (Ala. 2003) (quoting *Reynolds Metals Co. v. Hill*, 825 So. 2d 100, 104 n.1 (Ala.2002) (citing *Cutler v. Orkin Exterminating Co.*, 770 So. 2d 67 (Ala.2000))); *see also Mitchell v. H & R Block, Inc.*, 783 So. 2d 812, 816 (Ala. 2000)).

*Cotton*, 559 F.2d at 1331). "'This policy has special importance in class actions with their notable uncertainty, difficulties of proof, and length. Settlements of complex cases contribute greatly to the efficient utilization of scarce judicial resources and achieve the speedy resolution of justice, for a just result is often no more than an arbitrary point between competing notions of reasonableness.'" *In re Sunbeam Securities Litigation*, 176 F. Supp. 2d 1323, 1329 (S.D. Fla. 2001) (quoting *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 538 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990)).[2] The basis for this policy was articulated by the United States Court of Appeals for the Fifth Circuit in *Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567 (5th Cir. 1960), where that court stated:

> The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. But the very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a

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[2] In determining whether to approve a settlement, a court is entitled to rely upon the judgment of experienced counsel. *See Cotton*, 559 F.2d at 1330; *Laube v. Campbell*, 2004 WL 1872862, *10 (M.D. Ala. Aug. 23, 2004) ("the court should also consider the judgment of class counsel") (citing *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1215 (5th Cir. 1978); *Gaddis v. Campbell*, 301 F. Supp. 2d 1310, 1315 (M.D. Ala. 2004)). Although the court must rigorously and independently evaluate a proposed settlement, it should avoid substituting its judgment for that of counsel who negotiated the settlement. *See Cotton*, 559 F.2d at 1330-31; *Access Now, Inc.*, 2002 WL 1162422 at *4; *Sommers v. Abraham Lincoln Federal Savings & Loan Ass'n.*, 79 F.R.D. 571, 576 (E.D. Pa. 1978). Here, plaintiff's counsels' competence has been demonstrated to the Court through their appearances before the Court and through their written submissions in this litigation. As a result, the Court has no trouble finding that plaintiff's counsel are fully familiar with the facts and law applicable to this litigation and are well acquainted with the prosecution of such claims.

> recognition of the policy of the law generally to encourage settlements.

*Id.* at 571.

2. Although settlements are indeed encouraged in class actions such as the present case, in order to approve any such settlement, this Court must still engage in the rigorous analysis required by the Alabama Supreme Court and *Ala. Code* § 6-5-641. That is precisely what this Court did prior to entering its September 29, 2004 Order of Final Approval and Final Judgment of Dismissal With Prejudice as to the Settlement Class. Indeed, the Court thoroughly reviewed the parties' evidentiary and other submissions and the Objectors/Intervenors' evidence and other submissions, conducted the hearing required by *Ala. Code* § 6-5-641, and has carefully weighed all arguments presented to the Court. The Court further conducted its own independent research and analysis in order to satisfy itself fully that the requirements of Rule 23 of the Alabama Rules of Civil Procedure and *Ala. Code* § 6-5-641 were met in this litigation. To further demonstrate its rigorous analysis in this case, the Court will specifically address each of the requirements below.

3. In order to give its final approval to the proposed settlement in this case, the Court must first determine that the class is due to be certified pursuant to Rule 23 of the Alabama Rules of Civil Procedure. *See Ala. Code* § 6-5-641. "[A]t this stage of the proceedings, the kind and level of proof are distinctly different from those required at a trial on the merits. A plaintiff seeking to represent a class need not prove its entire case in order to satisfy the requirements of Rule 23." *Cheminova Am. Corp. v. Corker*, 779 So. 2d 1175, 1183 (Ala. 2000) (citing *Ex parte Government Employees Ins. Co.*, 729 So. 2d 299, 303 (Ala. 1999); *Ex parte AmSouth Bancorporation*, 717 So.2d 357, 366 (Ala.1998)). The decision to certify a class under Rule 23 is always within the sound discretion of the trial court. *See, e.g., Cheminova Am. Corp.*,

779 So. 2d at 1179; *Sizemore v. Owner-Operator Independent Drivers Ass'n, Inc.*, 671 So. 2d674, 676 (Ala. Civ. App. 1995) (citing Ex parte Hayes, 579 So. 2d 1343 (Ala.1991)); *Sims v. Montgomery County Com'n*, 1992 WL 714818, *3 (M.D. Ala. May 18, 1992) (citing *Coon v. Georgia Pacific Corp.*, 829 F.2d 1563, 1566 (1 11th Cir.1987)).

Rule 23(a) of the Alabama Rules of Civil Procedure provides:

> One or more members of a class may sue . . . as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"These four prerequisites are commonly referred to as numerosity, commonality, typicality, and adequacy." *Cheminova Am. Corp.*, 779 So. 2d at 1179 (citing *Warehouse Home Furnishing Distribs., Inc. v. Whitson*, 709 So. 2d 1144, 1148 (Ala.1997)). To certify a class, the Court must analyze each of these prerequisites and determine that they have been met. However, "[i]n so doing, the court may treat a factor as having been established if all parties to the action have so stipulated on the record and if the court shall be satisfied that such factor could be proven to have been established." *Ala. Code* § 6-5-641(e). Here, the plaintiff and defendants have so stipulated and, as discussed in its September 29, 2004 Order and herein, the Court finds that, based on the evidence submitted and the specific claims and defenses asserted by the parties, each of the Rule 23 factors could be proven to be established.

4. The first requirement that must be met under Rule 23 is numerosity. The Court finds that this requirement is easily

met in this case. "'For purposes of Rule 23(a)(1), impracticability is not equated in impossibility, but relates to the difficulty or inconvenience in joining all class members. . . . The numerosity requirement imposes no absolute minimum number, but is subject to examination of the specific facts of each case'" *Cheminova Am. Corp.*, 779 So. 2d at 1179 (quoting the trial court opinion and finding no abuse of discretion) (citing *Gomez v. Illinois State Bd. of Educ.*, 117 F.R.D. 394, 398-99 (ND. Ill. 1987); *General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980)). In addition, "'[t]he court can accept commonsense assumptions in order to support a finding of numerosity, and estimates of the class size suffice for the purpose of this rule.'" *Id.* (citations omitted in original). "'Approximation of the number of potential class members in consumer actions is generally the rule.'" *Id.* (quoting *Ex parte Government Employees Ins. Co.*, 729 So. 2d 299, 303 (Ala. 1999); citing 2 H. Newberg and A. Conte, *Newberg on Class Actions* § 7.22 (3rd ed. 1992)). Here, the defendants have freely conceded that there are many thousands of class members involved in this action. Moreover, the Objectors/ Intervenors have made no effort (and have offered no evidence) to challenge this requirement. Further evidence of this requirement is found in the fact that, in accordance with the Court's April 6, 2004 Order, the defendants direct mailed notice to approximately 30,551 individuals. Although there is no "magic number" of class members that will support the numerosity requirement for class certification purposes, classes of more than forty members are usually deemed to be sufficient. *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986); *Braxton v. Farmer's Ins. Group*, 209 F.R.D. 654, 658-59 (N.D. Ala. 2002) (citing *Cox*); *Exhaust Ltd. v. Cintas Corp.*, 2004 WL 1728598, *3 (S.D. 111. July 26, 2004) (citing H. Newberg, *Class Actions* § 305 (1992)). Accordingly, based on the evidence submitted and the stipulations of the parties, the Court finds the proposed class

here to be sufficiently numerous as to make joinder of all members impracticable.

5. Rule 23(a)(2) requires that the class members allege common questions of law or fact. The burden of establishing commonality is not heavy and is generally met where the plaintiff alleges that the defendant has engaged in a course of conduct that affects all class members and gives rise to the plaintiff's claims. *See Dujanovic v. Mortgage Am., Inc.*, 185 F.R.D. 660, 667 (N.D. Ala. 1999); *Braxton*, 209 F.R.D. at 659; *Evans v. American Credit Systems, Inc.*, 2004 WL 1427047, *6 (D. Neb. June 10, 2004) (quoting *In re Hartford Sales Practices Litig.*, 192 F.R.D. 592, 603 (D. Minn. 1999) ("the commonality requirement imposes a very light burden on the Plaintiff seeking to certify a class and is easily satisfied"). "'This provision does not require that all questions of law or fact be common. For example, factual variations among the class's grievances will not defeat a class action. A common nucleus of operative facts is usually enough to satisfy the commonality requirement of Rule 23(a)(2). This is true regardless of whether the underlying facts fluctuate over the class period.'" *Cheminova Am. Corp.*, 779 So. 2d at 1180 (quoting the trial court opinion).

6. Having reviewed the parties' filings and evidentiary submissions, the arguments and stipulations of counsel for the parties, the actual elements plaintiff would be required to prove in order to prevail on the claims alleged in this case, as well as the defenses that could have been asserted by the defendants, the Court finds that the nucleus of operative facts in the present case is common to all members of the class and that these common questions include at least the following:

(i) Whether defendants' practices violate the common law of Alabama and Georgia;

(ii) Whether defendants participated in and pursued a conspiracy and common course of conduct against plaintiff and the class;

(iii) Whether defendants, by nature of their wrongful conduct, are liable to plaintiff and the class for damages and losses;

(iv) Whether defendants breached the fiduciary duties and duties of care owed to the plaintiff and the class;

(v) Whether defendants misrepresented, concealed, and failed to disclose material facts to plaintiff and the class;

(vi) Whether the acts or omissions of defendants were done willfully, fraudulently, oppressively and/or maliciously;

(vii) Whether defendants breached their contract with each member of the plaintiff class;

(viii) The appropriate nature of class wide injunctive and equitable relief; and

(ix) Whether the class members have sustained damages or are entitled to restitution or disgorgement and forfeiture of sums gained by defendants as a result of defendants' conduct and, if so, what is the proper measure and appropriate formula to be applied in determining and disbursing such damages and relief

The Court finds that the common issues are the most significant issues in the case and can be resolved for all members of the class in this single action. The Objectors/ Intervenors have made no effort (and have offered no evidence) to challenge this requirement. Accordingly, the Court finds that there are questions of law and fact common to all members of the class and that the commonality requirement is met in this case.

7. Rule 23(a)(3) requires the named representative of the class to show that the claims and defenses of the representative party are typical of the claims and defenses of the class. This requirement is often considered to demand "no

more than that there exists no antagonism between the claims of the class representative and [those of] the other members of the class." *Dujanovic*, 185 F.R.D. at 667. "A factual variation will not render a class representative's claim atypical unless the factual position of the representative markedly differs from that of other members of the class." *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984). "'A representative's claim is typical [if it] arises from the same event or practice or course of conduct that gives rise to the claims of other class members and . . . [is] based on the same legal theory.'" *Cheminova Am. Corp.*, 779 So. 2d at 1180-81 (quoting the trial court opinion). "'Where, as here, the party seeking certification alleges that the same unlawful conduct was directed at the class representatives and the class itself, the typicality requirement is usually met irrespective of the varying fact patterns which underlie individual claims.'" *Id.* (quoting the trial court).

8. The plaintiff here alleges that she and the members of the proposed class sustained damages arising out of defendants' common course of conduct, which was allegedly directed at the plaintiff and at the members of the class itself. The plaintiff further alleges that the health insurance at issue here, as well as the resulting insurance trust arrangement, were the result of a common course of conduct which involved standardized documents and representations characterized by similar misrepresentations or omissions of material information. Upon consideration of this factor, and the fact that Objectors/Intervenors failed to present any viable evidence to challenge this element, the Court finds that the issues that affect plaintiff and the class members are indeed the same and, therefore, that the plaintiff's claims are typical of the claims of the class members. Accordingly, the Court finds that the typicality requirement is met.

9. Rule 23(a)(4) requires that the named plaintiff fairly and adequately protect the interests of the class. An analysis of

this requirement involves a two-part inquiry: (I) "'whether the named Plaintiffs have interests antagonistic to those of the rest of the class; and (2) whether Plaintiffs' counsel are qualified, experienced and generally able to conduct the proposed litigation.'" *Cheminova Am. Corp.*, 779 So. 2d at 1181 (quoting trial court, in turn citing *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir.1987)); *see also Dujanovic*, 185 F.R.D. at 668. Generally, "[a]dequate representation is presumed in the absence of contrary evidence." *Association for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 464 (S.D. Fla. 2002) (citing *Access Now, Inc. v. AHM CGH, Inc.*, No. 98-3004-CIV-GOLD-SIMONTON, 2000 WL 1809979, *2 (S.D. Fla. 2000)). Despite their arguments, the Objectors/Intervenors have presented no evidence to rebut this presumption. To the contrary, the Court finds that Ms. Gadson can and will fairly and adequately assert and protect the interests of the class, in that the evidence submitted by the plaintiff, including her own affidavit and those of her counsel, demonstrates that: (a) the representative plaintiff has no conflicts of interest with absent class members in the maintenance of this action, and pursues this action for the benefit of the plaintiff class; (b) the representative plaintiff has no present relationship with the defendant, in either an official or unofficial capacity; and (c) the representative plaintiff, taken in conjunction with counsel, has adequate financial and other resources to conduct this litigation in a manner assuring that the interests of the plaintiff class Will not be harmed. Further, this Court has previously determined that Ms. Gadson is adequate and that she retained counsel who are experienced in class litigation and who agreed to and had the ability to advance all costs of this litigation. Accordingly, the Court finds that the requirements of Rule 23(a)(4) are met in this case.

10. In addition to determining that the requirements of Rule 23(a) have been met, the Court must also consider the requirements of Rule 23(b). Here, the plaintiff seeks cer-

tification of a class under Rule23(b)(3) for both monetary and equitable relief. In order for certification of a Rule 23(b)(3) class to be proper, the Court must find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Ala. R. Civ .P.* 23(b).

11. "'To predominate, common issues must constitute a significant part of individual class members' cases. . . . Where, as here, a common course of conduct has been alleged arising out of a common nucleus of operative facts, common questions predominate." *Cheminova Air. Corp. v. Corker*, 779 So. 2d 1175, 1181 (Ala. 2000) (quoting the trial court opinion). "'In testing predominance, pursuant to Rule 23(b)(3), as well as testing superiority, the trial court should consider: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forums; (D) the difficulties likely to be encountered in the management of a class action'" *Id.* at 1181-82. The Court farads that each of these factors weighs strongly towards class certification in this case.

12. Additionally, "'In *Ex parte Green Tree Financial Corp.*, 723 So. 2d 6 (Ala.1998), the Court stated that in determining whether questions of law and fact are common to the class and whether these common elements predominate over individual issues, the Court should identify the substantive law applicable to the case and the proof required to establish the claim.'" *Cheminova Am. Corp.*, 779 So. 2d at 1181-82 (quoting the trial court opinion). The plaintiff alleges in this case that the defendants' scheme and actions with

regard to the marketing, sales, and administration of the subject health insurance were part of a common and consistent course of conduct that was uniformly directed at each class member and affected each class member similarly. The plaintiff further alleges that the subject trust and health insurance provided thereunder were the result of a common course of conduct which involves standardized documents and representations characterized by similar misrepresentations or omissions of material information. The Court finds that here, as in *Cheminova Am. Corp.*, "'[t]he central issues involved will be the conduct of the [defendants, uniformly applied across the class.'" *Id.* at 1182. In this case, the law is supplied by the common and statutory law of Alabama and of Georgia. The Court has examined the individual elements of plaintiff's claims under both Alabama law and Georgia law, and has thoroughly reviewed the parties' stipulations, evidence, and other submissions. Variations between the laws of Alabama and Georgia in this case do not overcome the common nature of this action. *See Cheminova Am. Corp.*, 779 So. 2d at 118182. The Court finds that the issues which affect plaintiff and the class members in common predominate over those which affect only the interest of any particular plaintiff class member.

13. The second requirement of Rule 23(b)(3) is that the class action be "superior to other available methods for the fair and efficient adjudication of the controversy." *Ala.R. Civ.P.* 23(b)(3). The United States Supreme Court has stated that this requirement was added to Rule 23 "to cover cases' in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (quoting *Fed.R.Civ.P.* 23 advisory committee notes). Here, the Court finds that a class action is superior to other available methods for the fair and efficient adjudication of this controversy under Rule 23(b)(3) because individual

joinder of all members of the class is impracticable. Moreover, the cost to the court systems of both Alabama and Georgia in adjudicating such individualized litigation would be substantial. Individualized litigation would also present the potential for inconsistent or contradictory judgments and would magnify the delay and expense to all parties and the court system in multiple trials of the complex factual issues of the case. This Court believes that conducting this action as a class action presents far fewer management difficulties, conserves the resources of the parties and the court system, and protects the rights of each class member. Here, as in the *Cheminova Am. Corp.* case, "'In the absence of class certification, it is probable that many claims would not be pursued because litigation costs would be prohibitive, and because many Class members may never know of their potential claims. The use of the class device in this action will serve the goals of economies of time, effort and expense by preventing the same issues from being litigated and adjudicated in multiple courts.'" *Cheminova Am. Corp.*, 779 So. 2d at 1182. The Court further finds, consistent with *Cheminova Am. Corp.*, that "'(1) any interest of [c]lass members in individually controlling the prosecution of separate actions is outweighed by the potential for the comprehensive and expedient resolution of this class action; (2) the number and type of individual lawsuits commenced by members of the [c]lass would not result in relief to the overwhelming majority of the [c]lass members; (3) it is desirable to concentrate the litigation in a single forum, to prevent repetitive pretrial discovery, trial preparation and trial, and to avoid inconsistent adjudications; and (4) no insurmountable difficulties are likely to be encountered in the management of this action.' *Id.* Thus, the Court finds that a class action here is superior to other available methods for the fair and efficient adjudication of the controversy.

Therefore, it is hereby ORDERED, ADJUDGED, and DECREED that the Court's September 29, 2004 Order of

Final Approval and Final Judgment of Dismissal With Prejudice as to the Settlement Class stands as written, but is hereby modified, amended, altered, supplemented, and clarified as set forth herein. The Objectors/Intervenors' motions to reconsider and supplement, having been heard on November 1, 2004, but withdrawn during the hearing, appear to be moot. Nonetheless, the Court has heard their arguments and offered them an additional evidentiary hearing but counsel for Objectors/Intervenors informed the Court, on the record, that they wished to withdraw their motions to reconsider and supplement. Therefore, these motions are denied as moot and in all other respects.

DONE this 10th day of November, 2004.

/s/ Johnny Hardwick
JOHNNY HARDWICK
Circuit Judge

Beasley, Allen, Crow, Mettmin, Portis & Miles

## APPENDIX D

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

[Filed Sept. 29, 2004]

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Civil Action No. CV-02-1601

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VIVIAN GADSON, individually and
on behalf of all others similarly situated,
*Plaintiff,*

v.

UNITED WISCONSIN LIFE INSURANCE COMPANY, et al.,
*Defendants.*

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## ORDER OF FINAL APPROVAL AND FINAL JUDGMENT OF DISMISSAL WITH PREJUDICE AS TO THE SETTLEMENT CLASS ("ORDER OF FINAL APPROVAL AND JUDGMENT")

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THIS MATTER having come before this Court on the application of the parties to a Stipulation of Settlement and Compromise dated March 10, 2004 (referred to herein, collectively with accompanying exhibits, as the "Stipulation") for approval of the settlement of the claims of the Settlement Class in the above-captioned action (the "Action") as set forth in the Stipulation; a hearing having been held before the Court on September 8, 2004; and this Court having considered the Stipulation, all other submissions, motions, objections, and evidentiary materials filed, and arguments by counsel and of any objectors made in connection therewith, and all of the pleadings, files, records, proceedings and hearings in this action; and this Court otherwise being fully advised and

informed, enters the following findings of fact and conclusions of law:

A. The terms used in this Order of Final Approval and Judgement shall have the same meanings as defined in the Stipulation except as may otherwise be specified herein.

B. On March 10, 2004, the parties entered into the Stipulation, which the Court preliminarily approved, pursuant to and as reflected in the Court's April 6, 2004 Order: (1) Accepting Stipulation of Settlement and Compromise Pending Fairness Hearing; (2) Certifying Settlement Class; (3) Approving Class Notice; and (4) Setting Schedule for Consideration of Proposed Settlement at Fairness Hearing (hereinafter "Preliminary Approval Order").

C. In the Preliminary Approval Order, the Court conditionally certified, for settlement purposes only: (1) a Settlement Class, pursuant to Rules 23(b)(2) and 23(b)(3) of the Alabama Rules of Civil Procedure, consisting of all persons (including the named plaintiff) in Alabama or Georgia who at any time in the Class Period, purchased or renewed a certificate of group health insurance from United Wisconsin Life Insurance Company that provided coverage to that individual and/or his or her family, excluding: (a) any holders of certificates of insurance whose insurance coverage through United Wisconsin Life Insurance Company at all times has been issued solely as small employer group coverage or under any other employer sponsored group health plan; (b) persons presently in a bankruptcy proceeding; (c) persons that have pending against one or more of the named defendants on the date of the Court's certification order any individual action wherein recovery sought is based in whole or in part on the type of claims asserted in this Action; (d) persons who, as to a particular defendant, have previously obtained a judgment or settled any claims against that same defendant concerning the type claim asserted herein or have previously executed releases, releasing any such claims against the same defendant;

(e) persons who own a policy of insurance with any defendant that is part of or related in any way to an employee welfare benefit plan, pension plan or any similar type plan that is governed by the ERISA statutes; and (f) persons currently serving as a judge or justice of any federal court in Alabama or Georgia (the "Settlement Class"). Under no circumstances shall the Court's certification of the Settlement Class be deemed precedent in any form for the future certification of any class action against the defendants. In the event the settlement provided for herein is not accomplished according to all the terms in the Stipulation, the Court's prior certification order shall be null and void and shall be vacated.

D. In the Preliminary Approval Order, the Court also approved the form of Notice to be directed to the Settlement Class Members, and ordered that such Notice be disseminated in accordance with the Preliminary Approval Order. Pursuant to the Preliminary Approval Order, Settlement Class Members were advised of, among other things, the conditional certification of such class, and the proposed settlement of the Action, and each Settlement Class Member was given the right to be excluded from the class and afforded an opportunity to serve and file objections and to be heard with respect to any matter related thereto.

E. Individual notice was provided to all potential Settlement Class Members who could be identified upon reasonable effort, and the Notice of the Proposed Settlement was provided by publication and mailed to the Settlement Class Members who could be identified from defendants' records. Affidavits filed with this Court demonstrate that the parties have complied with the Preliminary Approval Order with respect to the form and provision of notice and have given the best notice practicable under the circumstances. Such notice constituted valid, due, and sufficient notice to all Settlement Class Members, complying fully with the requirements of Rule 23 of the Alabama Rules of Civil Procedure, the Con-

stitutions of both the United States and the State of Alabama and other applicable law.

F. The Parties each have applied for approval of the terms of the Stipulation and for the entry of this Order of Final Approval and Judgment. Pursuant to the Settlement Notice and upon notice to the class, a hearing was held before the Court on September 8, 2004, to consider whether the Stipulation and the Settlement of the Action as to the Settlement Class as set forth in the Stipulation should be approved as fair, just, reasonable, and adequate.

G. The Court finds that only the 462 individuals or entities listed on Exhibit A hereto have timely "opted-out" from participation in this class. No other individuals or entities will be allowed to opt-out of the class, unless the Court specifically allows any individuals to opt-out by separate order.

H. All objections to the Stipulation or Settlement that were filed have been duly considered; and all persons are hereby barred and enjoined from filing any further objection thereto. The evidence submitted by the parties reveals that, excluding the 462 individuals who have elected to opt-out of participation in this class settlement, there are approximately 30,089 members of the Settlement Class. All potential objectors to this Stipulation were directed to object to it on or before August 19, 2004. Out of this class, only two objectors (Angela King and Valerie Askew) timely came forward and intervened in this Action to object to and challenge the Stipulation. Two other individuals (Jana Hutchinson and Sharon Henderson), who were also both represented by the same counsel who represent Ms. King and Ms. Askew, originally timely moved to intervene and object to the Stipulation. These individuals, however, subsequently withdrew their motion to intervene and object to the settlement. For unstated reasons, these two individuals then attempted to revoke their withdrawal of their motion to intervene on September 7, 2004. In addition, Mr. Jack Calm, who is also represented by

the same counsel as King, Askew, Hutchinson, and Henderson, filed a motion to intervene on September 7, 2004. The Court finds that even though all individuals who sought to object to this Stipulation where represented by the same counsel, only Ms. Askew and Ms. King timely filed their objections. Even though the other potential objectors did not timely file their motions to intervene and object to the Stipulation because they failed to do so under the Court's April 6, 2004 order, during the fairness hearing, the Court granted each individual's motion to intervene for the limited purpose of allowing them to appear and assert their objections to the Stipulation. The Court will address each of these individual's arguments separately.

With respect to these intervenors and their objections, and based on the evidence submitted and the arguments of all parties, the Court makes the following findings:

(1) Ms. King and Ms. Askew are both represented by the same attorneys. In addition to representing the intervenors here, these attorneys presently have at least thirty (30) other pending lawsuits against the same defendants present here and arising out of the same claims asserted here. In addition to these thirty (30) individual actions, the intervenors' attorneys are also counsel for plaintiffs in *Stephen and Anne Parker, et al. v. American Medical Security Group, Inc., et al.*, Civil Action No. 04-1-1980 (filed March 15, 2004), a class action lawsuit pending in the Superior Court of Cobb County, Georgia, which asserts claims against common defendants arising out of the same conduct alleged against those defendants in this Action. The Court finds that intervenors' counsel's involvement in these other, competing cases explains the impetus behind and real motivation for the objections offered here. *See, e.g., Smith v. Tower Loan of Mississippi, Inc.*, 216 F.R.D. 338, 370 (S.D. Miss. 2003), *aff'd*, 91 Fed. Appx. 952 (5th Cir. 2004) (noting that "[o]bjectors principally consist of counsel attempting to pursue competing

identical claims"); *In re Prudential Ins. Co. of Am. Sales Practices Litigation*, 148 F.3d 283, 318 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114, 119 S. Ct. 890, 142 L. Ed. 2d 789 (1999) (noting that the "most vociferous objectors are . . . litigants represented by counsel in cases that compete with or overlap [class] claims").

(2) Ms. King is not a member of the Settlement Class as defined by this Order of Final Approval. Indeed, the evidence submitted to the Court, including the affidavit of Joseph Keen (Director of Regulatory Affairs for defendant American Medical Security, Inc.) demonstrates that Ms. King "was insured through a small employer group policy." The class definition in this Action, however, specifically excludes individuals whose insurance was obtained from the defendants through such small employer group policies. It is now black-letter law that an individual must have standing in order to object to a proposed class action settlement and that, in order to have such standing, the individual must actually be a member of the proposed class. *Ex parte Anderson*, 807 So. 2d 505, 508 (Ala. 2000); *Association For Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 473-74 (S.D. Fla. 2002) ("non-class members are not permitted to assert objections to a class action settlement") (citing *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989); *Raines v. State of Florida*, 987 F. Supp. 1416, 1418 (N.D. Fla. 1997)); *see also San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1032 (N.D. Cal. 1999) ("nonclass members have no standing to object to the settlement of a class action"); *Kusner v. First Penn. Corp.*, 74 F.R.D. 606, 610 n.3 (E.D. Pa. 1977) (refusing to allow non-class member to intervene for purposes of objecting to settlement), *affd*, 577 F.2d 726 (3d Cir.1978); *Elkins v. Equitable Life Ins. of Iowa*, No. Civ.A96-296- Civ-T-17B, 1998 WL 133741, *29 (M.D. Fla. Jan. 27, 1998) (same); *In re Fernald Litigation*, No. C-1-85-149, 1989 WL 267039, *6 (S.D. Ohio Sept. 29, 1989) (same); *In re Warner Communications Sec. Litigation*, 618 F. Supp.

735, 754 (D.N.Y. 1985) (same); *Seiffer v. Topsy's Intern., Inc.*, 70 F.R.D. 622, 628 n.6 (D. Kan. 1976) (same). Here, however, Ms. King is not a member of the Settlement Class and the Court therefore finds that she lacks standing to object to the proposed settlement in this case. *See Ex parte Anderson*, 807 So. 2d 505, 508 (Ala. 2000) (citing *Gould v. Alleco, Inc.*, 883 F.2d 281 (4th Cir. 1989); *In re Union Carbide Corp. Consumer Prods. Business Sec. Litigation*, 718 F. Supp. 1099 (S.D.N.Y. 1989)).

(3) Because Ms. King lacks standing to object to the Stipulation, and for the reasons discussed below as to Jana Hutchinson, Sharon Henderson and Jack Cahn, only a single objector remains out of the 30,089 members of the Settlement Class (or approximately .000033 of the Settlement Class). However, the evidence submitted to the Court demonstrates that this lone objector, Valerie Askew, had her health insurance with defendant United Wisconsin Life Insurance Company for only one month during mid-1999. Thus, the defendants point out through the affidavit of Joseph Keen that "Ms. Askew was never processed for renewal under any methodology used by [defendants], including tier rating." Because she had her insurance for only a single month and never experienced any premium increase, Ms. Askew's basis for and motivation to assert objections to the Stipulation in this Action are suspect. In fact, as a member of the Settlement Class, Ms. Askew stands to receive greater benefits from the settlement than she would if she pursued an individual action. Nevertheless, because she is, in fact, a member of the Settlement Class, the Court has duly and thoroughly considered her objections and the arguments of her counsel and, as set forth herein, finds that the objections do not warrant this Court's withholding of final approval for the Stipulation and class settlement of this Action.

(4) Although Ms. Askew raises a number of objections, most of her arguments are based on her contention that Geor-

gia law is superior to Alabama law for the claims against the defendants in this case and, therefore, the Georgia class members are in a better position than the Alabama class members. This contention underpins Ms. Askew's contentions (i) that the claims of the Georgia consumers and Alabama consumers are not typical or common; (ii) that the Georgia class members are not adequately represented; and (iii) that Rule 23's superiority requirements are not met. It is also a common theme throughout most of her other objections to the Stipulation. As discussed herein, the Court finds that Georgia law is not demonstrably superior to Alabama law with respect to the claims asserted in this Action or the relief that could have potentially been obtained in this Action.

(5) Ms. Askew's contention that Georgia law is somehow superior to Alabama law is premised on her interpretation of O.C.G.A. § 33-30-12 and Ga. Comp. R. & Regs. 120-2-10-.12, attached hereto as Exhibit "B." Ms. Askew asserts that this statute and corresponding regulation provide more protection for Georgia class members than that available to Alabama class members for the defendants' alleged tier-rating practices. These alleged tier-rating practices are at the very heart of the plaintiff's claims in this Action. Section 33-30-12 of the Georgia Code is entitled "Standards and requirements for ratings of small groups" and, among other things, addresses how tier-rating and/or durational rating may be utilized when renewing "small group" insurance. *See* O.C.G.A. § 33-30-12(b), (d). Thus, as even Ms. Askew admitted, Section 33-30-12 is, on its face, limited to insurance coverage for "'small groups.'" [Intervenors' Brief, p. 8 (quoting O.C.G.A. § 33-20-12)1. Ms. Askew attempts to argue that the class members' insurance here falls within such "small group" insurance. Both the plaintiff and the defendants argue that the insurance at issue in this Action is not "small group" insurance and, therefore, is not covered by O.C.G.A. § 33-30-12 and Ga. Comp. R. & Regs. 120-2-10-.12. As discussed herein, the Court finds that there is no authority for Ms. Askew's

claim that the health insurance coverage at issue in this Action is covered by O.C.G.A. § 33-30-12 and Ga. Comp. R. & Regs. 120-2-10-.12 and that she has, therefore, failed to demonstrate how Georgia law is superior to Alabama law with respect to the alleged tier-rating practices at issue in this Action.

(6) Pursuant to O.C.G.A. § 33-30-12(a), "the term 'small group' means a group or subgroup of at least two and no more than 50 employees, members, or enrollees." In support of her argument that this section applies to the insurance at issue in this Action, Ms. Askew submitted an affidavit from Tim Ryles (an expert witness being utilized by Ms. Askew's counsel in the *Parker* case in Georgia). Subsequently in the *Parker* case, the defendants took Mr. Ryles's deposition, and the parties have submitted portions of that deposition transcript to the Court in this Action. Ms. Askew also offered the live testimony of Mr. Ryles during the fairness hearing. Thus the Court had an opportunity to, and did, observe Mr. Ryles's demeanor and credibility and assign weight to his testimony. It is clear to the Court that Mr. Ryles now admits that, for purposes of Section 33-30-12, he defines the "group" as "[e]verybody in Georgia who holds a MedOne certificate." Mr. Ryles also agrees that the "group" of MedOne insureds in Georgia must either exceed 50 people or consist of less than two people, depending on how Mr. Ryles views it. No matter how he views it, however, it is clear from his testimony that the MedOne "group" is not between two and fifty individuals. Mr. Ryles further agrees that, even if you separately considered each and every individual Georgia insured as a "group" or "subgroup," the plain language of Section 33-30-12, on its face, does not apply to the class members' insurance in this case. This Court agrees.

(7) Notwithstanding the failure of the plain language of O.C.G.A. § 33-30-12 to support Ms. Askew's claims, Mr. Ryles takes the position that Ga. Comp. R. & Regs. 120-2-10-

.12 (the Georgia insurance regulation governing "small group health insurance access and pooling") somehow still pulls the insurance at issue in this Action within the statute. In his deposition in the Parker case, Mr. Ryles testified that, in his opinion, Regulation 120-2-10-.12(8) includes the class members' insurance here as a "one life group." Mr. Ryles concedes that if this regulation does not in fact apply to the class members' insurance, then the statute does not apply at all. On its face, however, Regulation 12-2-10-.12(8) provides that it applies only to "small group health insurance policies or contracts actively marketed to small groups, or certificates from such policies or contracts, to *sole proprietors or other employers* with only one employee, member, or enrollee (not counting dependents)." Ga. Comp. R. & Regs. 120-2-10-.12(8)(a) (emphasis added). In addition, the Court finds that Mr. Ryles omitted material language from these Georgia statutes and regulations in the affidavit that he submitted to the Court and conceded this omission during his cross examination by defense counsel during the fairness hearing. The Court finds that Mr. Ryles testimony is not credible to the extent that the objectors offer it to show that the Georgia class members somehow have superior liability and damage claims available to them that the Alabama class members do not have. In fact, during his cross examination, Mr. Ryles admitted that he does not know whether the Georgia class members' claims and damages are superior to the Alabama Class members' claims and damages and testified further that he tried to "steer" away from those issues. Dispite his concessions, the alleged superiority of the Georgia class claims is the thrust of what Ms. Askew claims is her reason for this Court to disapprove of the settlement here. The Court rejects her argument not only under the Georgia law, but also through the testimony of Ms. Askew's very own expert, Mr. Ryles. Thus, the plain language of the regulation limits its applicability to employer-related health insurance policies and certificates of coverage. The evidence submitted in this Action satisfies the Court that

the insurance coverage at issue here is not employer-related health insurance. Moreover, the class definition specifically excludes the very small group, employer-related health insurance coverage contemplated and governed by O.C.G.A. § 33-30-12 and Ga. Comp. R. & Regs. 120-2-10-.12(8). Thus, the Court finds that Ga. Comp. R. & Regs. 120-2-10-.12(8)(a) should not apply to the insurance of the Settlement Class in this case.

(8) Other than the opinion of Mr. Ryles, Ms. Askew failed to offer the Court any authoritative interpretation of either 0.0 .G.A. § 33-30-12 or Ga. Comp. R. & Regs. 120-2-10-.12 that would lend any support to her objections. Even Mr. Ryles testified both in his deposition in the *Parker* case and during the fairness hearing that he could not name anybody with the Georgia Insurance Commissioner's office who could support his opinion. Moreover, the Court was unable to locate any case law or other administrative opinions that would support Ms. Askew's position. Thus, in construing her objections in the light most favorable to her, what Ms. Askew really argues in this Action is that there is some *possibility* that Georgia law *might* have additional statutory and regulatory provisions not found in Alabama that *could potentially* apply to the class members' insurance. However, these are the very uncertainties of litigation that highly favor class settlements. *See, e.g., Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960) ("The very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements."); *see also In re Sunbeam Securities Litigation*, 176 F. Supp. 2d 1323, 1329 (S.D. Fla. 2001) (quoting *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 538 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990)); *TBK Partners, Ltd. v. Western Union Corp.*, 517 F. Supp. 380, 389 (S.D.N.Y. 1981), *aff'd*, 675 F.2d 456 (2d Cir. 1982); *Wellman v. Dickinson*, 497 F. Supp. 824, 830-

31 (S.D.N.Y. 1980), *aff'd without op.*, 647 F.2d 163 (2d Cir. 1981).

(9) Even if the Court were to determine that the statute and regulation offered by Ms. Askew did apply to the insurance coverage at issue in this Action, the Court holds that there is no private right of action available to Georgia citizens to enforce O.C.G.A. § 33-30-12 and Ga. Comp. R. & Regs. 120-2-10-.12(8). Ms. Askew failed to cite the Court to even a single court opinion or ruling that would support any such right and the Court could locate no such law. To the contrary, a review of analogous court opinions from Georgia reveals that there generally is no such private right of action to enforce insurance statutes and regulations. *See, e.g., Cross v. Tokio Marine & Fire Ins. Co.*, 254 Ga. App. 739, 563 S.E.2d 437 (2002); *Jones v. New England Life Ins. Co.*, 974 F. Supp. 1476, 1482 (M.D. Ga. 1996) (no private cause of action against insurance company for failure to comply with Georgia insurance regulations); *Espinoza v. Union Sec. Life Ins. Co.*, Civ. A. No. 1:95-cv-453-MHS, 1996 WL 380702, *3 (N.D. Ga. Jan. 24, 1996) (no private right of action to enforce Georgia insurance statute—enforcement left to Georgia Commissioner of Insurance); *Dixon v. S & S Loan Service of Waycross, Inc.*, 754 F. Supp. 1567, 1575 (S.D. Ga. 1990) (plaintiffs had no private right of action to enforce Georgia insurance regulations); *Generali-U.S. Branch v. Southeastern Security Ins. Co.*, 229 Ga. App. 277, 280, 493 S.E.2d 731 (1997); *Parris v. State Farm & c. Ins. Co.*, 229 Ga. App. 522, 494 S.E.2d 244 (1997).

(10) As discussed above, Ms. Askew's argument that Georgia law is superior to Alabama law is dependent on the affidavit, deposition and live testimony of Tim Ryles. In fact, Ms. Askew's brief here was, in large part, a restatement of Mr. Ryles's twenty-five (25) page affidavit. Subsequent to giving that affidavit, however, Mr. Ryles testified in his deposition in the *Parker* case and live at the fairness hearing.

Upon a review of his testimony, the Court finds that Mr. Ryles conceded that Georgia law specifically allows insurance companies, including the defendants in this case, to perform tier-rating when renewing insurance coverage, whereas Alabama law more strictly prohibits all such tier rating at renewal. Thus, Mr. Ryles and, as a result, Ms. Askew, conceded that, even under Mr. Ryles's theories, Alabama law is actually more restrictive than Georgia law with respect to the alleged tier-rating practices which form the basis of the class claims in this case. Mr. Ryles specifically testified that it is indeed acceptable to tier rate in Georgia within the 25% parameters set forth in O.C.G.A. § 33-30-12. Moreover, based on Mr. Ryles's theory that each individual insured in Georgia is his own "group" for purposes of O.C.G.A. § 33-30-12, he concedes that it is acceptable in Georgia to adjust (within the 25% parameter) that individual's renewal rates based on the individual's personal health claims experience. Notwithstanding the language of his affidavit, Mr. Ryles testified during both his deposition in the Parker case and at the fairness hearing that he never intended for any Court to believe that he was opining that Georgia law is *better* than Alabama law or that Georgia class members have been damaged to a greater extent than Alabama class members. For the reasons discussed herein, the Court finds that Georgia law is not demonstrably superior to Alabama law with respect to the claims at issue in this case. In fact, it appears to the Court that, if anything, Alabama law is somewhat more restrictive than Georgia law regarding the alleged tier-rating practices at issue in this case.

(11) Ms. Askew also claims Georgia class members have been unfairly disadvantaged in this Action because the plaintiff did not assert a claim against the defendants under the Georgia Racketeering Influenced and Corrupt Organizations Act ("RICO"), O.C.G.A. §§ 16-14-1 *et seq.* The crux of Ms. Askew's argument is that the Georgia RICO statute allows the potential for treble damages and punitive damages. How-

ever, these same punitive damages would be equally available to all class members in the present case under the claims set forth in the complaint. As discussed in this Final Order of Approval, the Court finds that the consideration to the Settlement Class is fair, reasonable, and adequate under the circumstances and in light of the claims asserted and, in the case of Georgia RICO, those claims that might have been asserted. As with almost all claims asserted in a class action lawsuit, there are inherent risks and difficulties both in getting a Georgia RICO class certified and actually prevailing on such claims. *See, e.g., Aetna Cas. & Sur. Co. v. Cantrell*, 399 S.E.2d 237 (Ga. App. 1990) (reversing trial court class certification in case asserting Georgia RICO claims); *Stevens v. Thomas*, 361 S.E.2d 800 (Ga. 1987) (same); *Buford v. H & R Block, Inc.*, 168 F.R.D. 340 (S.D. Ga. 1996) (denying class certification in case asserting Georgia RICO claims); *Bohannon v. Allstate Ins. Co.*, 118 F.R.D. 151 (S.D. Ga. 1986) (denying class certification on Georgia RICO claims).

(12) The Court further finds that, although the plaintiff in this Action did not assert a Georgia RICO claim against the defendants, the plaintiff has asserted claims not present in the competing Georgia class action and against a defendant not present in that case. Specifically, in her complaint, as amended, the plaintiff asserts claims against defendants AmSouth Bank and American Medical Security for alleged breaches of fiduciary duties. If ultimately proven, these common law claims could potentially provide for substantial damages, including the award of punitive damages and, in certain cases, an award of attorneys' fees. Thus, the plaintiff in this Action has asserted claims that would potentially provide the same substantive relief afforded under Georgia's RICO statute and the plaintiff's failure to assert such a cause does not warrant a rejection of the Stipulation and a settlement of this Action.

(13) Among the arguments presented by Ms. Askew, the most serious allegation is her contention that there was collu-

sion between the plaintiff and defendants in reaching the Stipulation in this Action. The Court does not take such accusations lightly, but notes that Ms. Askew failed to provide the Court with any actual evidence or valid argument to support her suspicions. Ms. Askew does state that her suspicion is based on the fact that this case was originally filed as a nationwide class action, but was eventually altered to include only Alabama and Georgia. Ms. Askew, however, has not cited the Court to even a single case where such a settlement—especially after two years of contentious litigation—raised any suspicion of collusion. Instead, Ms. Askew cites the Court to *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3rd Cir. 1995). An actual reading of that case, however, reveals that nowhere in its opinion did the Third Circuit ever express any opinion about a nationwide class versus a multiple state class. Where, as here, "the trial court finds that the settlement is fair and reasonable, then the court may assume that the negotiations were proper." *Adams*, 676 So. 2d at 1274 (citing *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195 (5th Cir.1981), *cert. denied*, 456 U.S. 998, 102 S. Ct. 2283, 73 L. Ed. 2d 1294 (1982)); *see also Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 152 (S.D. Ohio 1992); *White v. National Football League*, 836 F. Supp. 1458, 1484 (D. Minn. 1993).

(14) Ms. Askew also contends that the class notice in this case was inadequate because, in her opinion, "the notice denies class members sufficient information upon which to make an informed decision, and the notice is confusing and the limited time in which class members were given to receive said notice and comply with its strictures is burdensome." The Court, however, has previously examined the notice provided to the members of the class and concluded that the required notice was the best notice practicable and adequately advised the Settlement Class of this action and the settlement contemplated herein. Ms. Askew has presented the Court with no evidence or argument to reasonably suggest otherwise.

Moreover, the class members in this case appear to have received even more than the typical notice provided in similar class actions. Indeed, Ms. Askew's attorneys admitted at the fairness hearing that they engaged in an extensive television advertising campaign to educate both Alabama and Georgia class members and to solicit objectors arid opt-outs. Thus, the class members had even more opportunity to inform themselves about the merits of this settlement. Their efforts produced, however, only one objector with standing to object to the fairness of this Stipulation. Such a low number of objectors in and of itself is evidence that this settlement is fair, adequate and reasonable. *See, e.g., Amoco Oil Co.*, 211 F.R.D. at 467 ("[A] small number of objectors from a plaintiff class of many thousands is strong evidence of a settlement's fairness and reasonableness.") (citing *Cotton*, 559 F.2d at 1331; *Bennett v. Behring Corp.*, 96 F.R.D. 343, 352-53 (S.D. Fla. 1982), *aff'd*, 737 F.2d 982 (11th Cir. 1984)).

(15) Ms. Askew also originally attacked the proposed award of attorneys fees and expenses to class counsel in this Action in her written filings to the Court. During the fairness hearing, however, her attorneys withdrew their objection to the award of $2.5 million in attorney fees if the Court ultimately finds that this settlement is indeed fair, adequate and reasonable and approves it as such. As discussed elsewhere in this Final Order of Approval, the Court finds that the efforts of the attorneys for the plaintiff class have provided a significant economic benefit to the class. Having considered the relevant criteria for the award of such fees, the plaintiff's counsels' motion and supporting affidavits, together with the testimony of attorneys knowledgeable in this area, and based upon the Court's review of this matter, the Court finds, as discussed below, that the amount requested is reasonable.

(16) In addition to the objections discussed in detail above, Ms. Askew also provided the Court with a laundry list of additional objections generally attacking the fairness, rea-

sonableness, and adequacy of the class settlement in this Action. As discussed elsewhere in this Final Order of Approval, the Court finds that the settlement here is fair, reasonable, and adequate. The Court has examined and considered each of the additional objections and arguments put forth by Ms. Askew and finds that they provide no basis to withhold final approval as set forth herein.

(17) As to Jana Hutchinson and Sharon Henderson, the Court finds that their September 7, 2004 revocation of their original motion to intervene is untimely under the Court's April 6, 2004 order and is denied for this reason alone. Even though these individuals originally timely objected to the Stipulation, they withdrew that motion and objection on September 7, 2004. Their counsel gave no reason for their withdrawal of their timely filed objections and gave no reason for the belated attempt to revoke their withdrawal. Despite the untimeliness of their objections, the Court nonetheless rejects the merits, or lack thereof, of the objections also. Ms. Hutchinson and Ms. Henderson only objected to the form and content of the notice and claim forms. The Court finds that the claim forms are proper in all respects and do not overly complicate the ability of class members to seek the benefits of this settlement, particularly in light of the fact that the claim forms will help ensure that defendants will only be required to pay legitimate claims. Moreover, defendants have agreed not to require class members to include their policy numbers on the form itself in order to receive the benefits of this Stipulation, and this requirement was the only real gripe that Ms. Huchenson and Ms. Henderson advanced in the attempted but withdrawn objections. Thus, the Court finds that these individuals objections were neither timely filed nor have any merit.

(18) As for Mr. Cahn, the Court finds that his objections to the Stipulation were untimely because he failed to assert them on or before August 19, 2004 as this Court's approved

notice required. In addition, the Court also finds that Mr. Cohen timely and validly opted-out of the Stipulation. As such, (i) he no longer is a class member to the Action; (ii) he is not bound by the terms of this settlement; and (iii) he simply has no standing to object to any of the terms of the Stipulation. *See Ex Parte Anderson*, 807 So. 2d 505, 508 (Ala. 2000). For these reasons, the Court rejects the objections raised and asserted by Mr. Cohen.

I. Having determined that: (i) the Settlement provides financial benefits to Settlement Class Members; (ii) there is no evidence suggesting that the Settlement was the result of anything other than good-faith arms-length negotiations; (iii) counsel for the Settlement Class conducted a reasonable investigation of the facts and law relating to the claims asserted by Settlement Class Members, including examination of all documents produced by defendants in response to plaintiffs' discovery requests, conducting depositions of executives of defendants, and retaining experts to review insurance products issued by defendants; and (iv) counsel for the Selnement Class are experienced in class action litigation, the Court concludes that the Stipulation and the Settlement are the product of substantial, good faith, arms-length negotiations between the parties, and are in all respects fair, just, reasonable, and adequate to the Settling Parties and to the Settlement Class and its members. The Court further concludes that counsel for the Settlement Class have adequately represented the interests of Settlement Class Members.

J. Also before the Court is plaintiffs' counsels' application for attorneys' fees, together with supporting affidavits and other material. The Court finds, pursuant to review of that application, that the efforts of the attorneys for the plaintiff class have provided a significant economic benefit to the class. Having considered the relevant criteria for the award of such fees, together with the testimony of attorneys knowledgeable in this area, and based upon the Court's review of

this matter, the Court finds that the amount requested is reasonable. In support of its ruling, the Court makes the following additional findings:

(1) The Court finds that the efforts of plaintiffs' counsel in this case led to the creation of benefits to the class. It is well established that where a representative party has made a "substantial contribution" to conferring a "benefit" upon an identifiable class, counsel for that party is entitled to an allowance of attorneys' fees relative to the benefit obtained. *See, e.g., Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188 (6th Cir. 1974, *cert. denied*, 422 U.S. 1048 (1975); *Ex parte Horn*, 718 So.2d 694, 702 (Ala. 1998). The "substantial benefit" doctrine serves the goal of equitably distributing the fees and costs of successful litigation among all who gained from the named plaintiff's efforts. *See Ramey*, 508 F.2d at 1995; *Reiser v. Del Monte Properties Co.*, 605 F.2d 1135, 1139 (9th Cir. 1979). In awarding attorneys' fees, the impact of the litigation in producing the benefits is an important factor that the Court should consider. Plaintiffs' litigation effort, however, need not be the sole cause in producing the benefit. *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 916 (3rd Cir. 1985) ("Although the litigation must have been a 'catalyst for the implementation of all or any of the reform measures' it need not have been the catalyst.") (citations omitted). Rather, the efforts of plaintiff's counsel must play a substantial and important role or make a "significant contribution." *Steiner v. Fruehauf Corp.*, 121 F.R.D. 304, 308 (E.D. Mich. 1988), *aff'd*, 883 F.2d 438 (6th Cir. 1989); *see also Morrison v. Ayoob*, 627 F.2d 669, 671 (3rd Cir. 1980) (per curiam), *cert. denied*, 449 U.S. 1102 (1981) ("[T]he action need not be the sate cause. Where there is more than one cause, the plaintiff is a prevailing party if the action was a material factor in bringing about the defendant's action."); *United Handicapped Fed'n v. Andre*, 622 F.2d 342, 346 (8th Cir. 1980) ("The lawsuit served in part as a catalyst which

promoted the defendant to take action."); *Joy Mfg. Corp. v. Pullman-Peabody Co.*, 729 F. Supp. 449, 457 (W.D. Pa. 1989) ("the Berger intervention was a material factor in producing a benefit to Joy and its shareholders"). In this case, there is no question that plaintiffs' counsel vigorously prosecuted this action, and through their efforts the Class Members will obtain a combination of cash refunds, premium credits on future premiums, and injunctive relief. The evidence presented to this Court demonstrates that the total settlement value exceeds eleven million dollars ($11,000,000), even without considering the substantial injunctive relief afforded to the Settlement Class.

(2) The Alabama Supreme Court has adopted the percentage-of-recovery method as the means for awarding attorneys' fees to class counsel in common-fund cases. *Edelman & Combs v. Law*, 663 So. 2d 957 (Ala. 1995), is the most recent case in a considerable line of authority in Alabama on this issue. In *Edelman*, the court made clear that the percentage of recovery method is appropriate for use in common-fund cases: "We hold that in a class action where the plaintiff class prevails and the lawyer's efforts result in a recovery of a fund, by way of settlement or trial, a reasonable attorney fee should be determined as a percentage of the amount agreed upon in settlement or recovered at trial." *Edelman*, 663 So. 2d at 959. *Edelman* is consistent with precedent from the federal courts on this issue. The United States Supreme Court has consistently held that the percentage-of-recovery approach is an appropriate methodology for assessing plaintiffs' counsel's fees. *See, e.g., Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164-67 (1939); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 123 (1885); *Trustees v. Greenough*, 105 U.S. 527, 533 (1882). The Supreme Court has stated that "under the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class. . ." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). That is, "the fee request must be looked

at in terms of the percentage it represents *of the total recovery.*" *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 749 (S.D. N.Y. 1985), aff'd 798 F.2d 35 (2nd Cir. 1986) (emphasis added). Consistent with United States Supreme Court precedent, numerous Courts of Appeal and District Courts across the country, including the Eleventh Circuit Court of Appeals, have noted the desirability and appropriateness of the percentage method. Indeed, a vast majority of the Circuits permit percentage awards and some Circuits have gone further and, in fact, have mandated the use of the percentage method. *See, e.g., Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 768 (11th Cir. 1991) (mandating the use of the percentage of fund method in common fund cases); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) (mandating the use of the percentage of fund method in common fund cases); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988), *cert. denied*, 488 U.S. 822 (1988); *Paul, Johnson, Alston & Hunt*, 886 F.2d at 272-73; *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995). Accordingly, the Court finds that the attorneys' fees to be awarded in this Action should be based on a percentage of the total recovery.

(3) The percentage-of-recovery method is consistent with, and indeed is intended to minor, practice in the private marketplace where contingent-fee attorneys typically negotiate percentage fee arrangements with their clients. As Judge Posner emphasized in *In re Continental Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992): "The object in awarding a reasonable attorney's fee . . . is to simulate the market. . . . The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client." *See also Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) ("When the 'prevailing' method of compensating lawyers for 'similar ser-

vices' is the contingent fee, then the contingent fee is the 'market rate') (emphasis in original). Thus, the Court finds that the percentage awarded under the percentage approach should reflect the same incentives, and provide the same reward for efficient efforts, as in non-class action litigation.

(4) In this Court's experience, contingency fees in non-class action cases typically are in the range of 33% to 50%. In their concurring opinion in *Blum*, Justices Brennan and Marshall observed that: In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In most cases, therefore, the fee is directly proportional to the recovery. *Blum*, 465 U.S. at 904; *see also In re Prudential Sec. Inc. Ltd. Partnership Litig.*, 912 F. Supp. 97, 101 (S.D.N.Y. 1996) (noting that "investors entered retainer agreements with private counsel which provided for a contingent fee ranging between 33-1/3% and 40% of the amounts recovered."); *Kirchoff*, 786 F.2d at 323, (observing that "40% is the customary fee in tort litigation . . ."). In *Edelman & Combs v. Law*, the Alabama Supreme Court stated: "Where a recovery is made on behalf of a class, it is reasonable to award attorney fees on the basis of a percentage of the amount recovered. In some cases 20% may be reasonable, based upon the amount of the award and other factors. In other cases 40%, or even 50%, may be justified." *Edelman*, 663 So. 2d at 96. In considering fee requests in common fund cases which include injunctive relief as a component of the recovery, moreover, courts commonly include the value of the injunctive relief in evaluating the fee request. *Camden I*, 946 F.2d at 775 (the amount of "any nonmonetary benefits conferred upon the class" is a principal factor in determining the proper percentage for a fee award); *Abbey v. Lloyd's of London*, 975 F. Supp. 802, 807 (E.D. Va. 1997) ("A fee award may be predicated on the grant of either monetary or equitable relief"); *Arenson v. Board of Trade*, 372 F. Supp. 1349 (N.D. Ill. 1974); *In re Domestic Air Transportation Antitrust Lit.*, 148 F.R.D. 297 (N.D. Ga. 1993)

(adopting constructive common fund theory for fees in non-monetary benefit situations); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240 (S.D. Ohio 1975) (determining percentage for fees based on total estimated present value of settlement, including injunctive relief). Applying all of these considerations, the Court finds that the requested fee in this case is both reasonable and appropriate.

(5) The Court further finds that each member of the class will obtain substantial benefits from the favorable result obtained on their behalf, including a combination of cash refunds, premium credits on future premiums, and injunctive relief. Plaintiffs' counsel's efforts, performed entirely on a contingent fee basis, resulted in benefits that have a present economic value to the Class of at least ten million dollars. The success achieved, coupled with the time within which the result issued, justifies the percentage fee requested. Based on the favorable result and the time within which it was obtained, plaintiffs' counsel have applied for an award of attorneys' fees in the amount of less than 25% of the common fund, plus reimbursement of expenses in the amount of ten thousand dollars ($10,000.00). Such a fee is reasonable, particularly in light of the risks attendant to class counsel's prosecution of this case. Accordingly, the Court finds that class counsel's request for a $2.5 million fee is reasonable and appropriate and that plaintiffs' counsel are entitled to reimbursement of the requested expenses of ten thousand dollars ($10,000.00).

(6) The Court further finds that plaintiffs' counsels' fee request is supported by consideration of the factors for determining a reasonable fee identified in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974). Although they originated in a statutory fee case, the *Johnson* factors may be considered in determining a reasonable fee in a common fund case. *See, e.g., Brown*, 838 F.2d at 456. The

Alabama Supreme Court has employed a twelve-factor analysis, virtually identical to the *Johnson* factors, for determining an appropriate award of attorneys' fees. *Edelman*, 663 So. 2d at 960. Those factors are: (1) the nature and value of the subject matter of the employment; (2) the learning, skill and labor requisite to its proper discharge; (3) the time consumed; (4) the professional experience and reputation of the attorney; (5) the weight of his responsibilities; (6) the measure of success achieved; (7) the reasonable expenses incurred by the attorney; (8) whether the fee is fixed or contingent; (9) the nature and length of the professional relationship; (10) the fee customarily charged in the locality for similar legal services; the likelihood that a particular employment may preclude other employment; and the time limitations imposed by the client or by the circumstances. Depending on the specific facts of the case, a trial judge may totally ignore some factors and give others different relative weights. *Id.*; *see Ramos v. Lamm*, 713 F.2d 546, 552 (10th Cir. 1983). But in a common fund case, the amount involved and results obtained are the "decisive factor." *Brown*, 838 F.2d at 456. *See also Peebles v. Miley*, 439 So.2d 137 (Ala. 1983) (establishing general guidelines for courts in determining reasonable attorney fees). A review of these factors reveals that the requested fee is reasonable.

(7) The Court finds that the complexity of the issues in this case required a high degree of legal skill. Defendants were represented by attorneys with extensive experience in similar litigation. To prosecute the claims of the class—against defendants represented by highly capable counsel—it was necessary to have lawyers with substantial experience in class actions and other complex litigation. Plaintiffs' counsel's work in this case confirms that they possessed the skill necessary to prosecute the case effectively. The evidence presented to the Court also demonstrates that plaintiffs' counsel has substantial experience in class actions and other complex litigation. As for their ability, the Court is in an

excellent position to make its own assessment, having conducted hearings on various matters, and having generally supervised this case throughout pretrial proceedings and believes that plaintiffs' counsel have the requisite experience and ability. Thus, the Court finds that these factors weigh in favor of the requested fee.

(8) The Alabama Supreme Court has held that, in common-fund cases, "strict reliance on 'the time consumed' factor . . . could encourage and reward protracted litigation[,]" and for that reason the factor "has limited significance in a common fund case." *Edelman*, 663 So. 2d at 960. In this vein, the Court in *Edelman* noted that "[o]ne thousand plodding hours may be far less productive than one imaginative, brilliant hour." *Id.* at 960 (internal quotation omitted). The Court finds that this case provides a textbook example of why the "time expended" factor has limited significance. Class counsel obtained adequate relief for the plaintiff and the Class Members after working on this case for more than two years. Counsel investigated claims of the class members, participated in extended motion practice, conducted hearings, took testimony before the Alabama Department of Insurance, and spent several months negotiating an arms-length settlement. The evidence submitted to the Court demonstrates that thousands of hours were spent by counsel and staff on this case. Thus, the Court finds that these factors weigh in favor of the requested fee.

(9) In awarding attorneys' fees in a common fund class action, the amount involved and the results obtained are also a decisive factor. *Brown*, 838 F.2d at 456. In *Brown*, the Tenth Circuit explained that this factor may be given greater weight—particularly in comparison with the time and labor required—when "the recovery was highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class." *Id.* The Court finds that both conditions apply here. In this Court's opinion, this case presented

substantial risks, making the prospect of a recovery, and thus an award of fees, highly contingent. Class counsel had no assurance of success. Likewise, there can be no doubt that class counsel were instrumental in obtaining the recovery. Thus, the Court finds that these factors weigh in favor of the requested fee.

(10) The proceedings before this Court demonstrate that the stakes in this case were high. Despite the complexity of the factual and legal issues involved, and the numerous obstacles to recovery, plaintiffs' counsel has successfully obtained a judgment in favor of the class providing for a significant recovery. The Court finds that this factor weighs in favor of approval of the requested fee.

(11) Without any assurance of remuneration, plaintiffs' counsel undertook to prosecute this action on a contingent basis. Yet, from the inception of this action, there was a very real possibility that plaintiffs' counsel might obtain no recovery, and hence no compensation. Among other things, plaintiffs' counsel faced difficulties posed (i) by the complex litigation concerning the filed rate doctrine issue, and (2) by the unfavorable recent opinions in insurance fraud law which impacted the litigation issues here. Moreover, as the Second Circuit recognized in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974), "despite the most vigorous and competent of efforts, success is never guaranteed." The risk of non-payment in complex cases such as this case is very real and is heightened when plaintifts' counsel press to achieve the very best result for those they represent. There are numerous contingent fee actions in which plaintiffs' counsel expended hundreds of hours and vet received no remuneration whatsoever despite their diligence and expertise. These very plaintiffs' counsel have represented to this Court that they have, in past cases, fully litigated through motion practice, pre-trial discovery, and trial cases they ultimately lost and for which, consequently, they will never be compensated.

As one court recently explained: "The court is well aware that there are numerous contingent cases such as this where plaintiffs' counsel, after investing thousands of hours of time and effort, have received no compensation whatsoever. Numerous cases recognize that the attorney's contingent fee risk is an important factor in determining the fee award . . . In evaluating [the contingent fee] factor the Court will not ignore the pecuniary loss suffered by plaintiffs counsel in other actions where counsel received little or no fee." *Ressler v. Jacobson*, 149 F.R.D. 651, 656 (M.D. Fla. 1992) (citations omitted). As the Second Circuit stated in *Grinnell*, 495 F.2d at 470: "[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance has agreed to pay for his services, regardless of success." The Court finds that these factors weigh in favor of approval of the requested fee.

(12) The Court finds that is not a case that is comparable to one in which a law firm may charge a reduced fee because of the prospect that plaintiffs' counsel will benefit in the long run from repeat business with the client. Thus, this factor weighs in favor of approving the fee as requested.

(13) The "customary fee" factor in a common fund case is the same as the factor suggesting consideration of awards in similar cases. Awards in similar cases are discussed elsewhere in this order. Moreover, the Court finds that plaintiffs counsel's fee request here is lower than fees customarily charged in non-class complex commercial cases in which representation is undertaken on a contingent fee basis. The consistency of the request for fees made in this motion with awards of attorneys' fees made in numerous other cases, including other class actions or other complex cases involving similar recoveries, is also discussed in other sections of this order. The Court finds that these factors weigh in favor of the requested fee.

(14) The Court also finds that the factor of "time limitations imposed by the client or circumstances" weighs in favor of the requested fee. Plaintiffs' counsel undertook tremendous risk in prosecuting a politically-charged and time-sensitive case. Thus, the Court finds that all of the applicable factors support approval of the plaintiffs' counsels' fee request.

(15) After due consideration, the Court further finds that several of the *Johnson* factors are not applicable to the present case, including the expenses incurred (as they are addressed separately from the fee), the undesirability of this case within the legal community, and the possibility that other employment would be precluded.

(16) The Supreme Court has long recognized that, without the availability of a class action, small claimants would in many cases have no access to judicial relief. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) ("Economic reality dictates that petitioner's suit proceed as a class action or not at all."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("Class actions . . . may permit plaintiffs to pool claims which would be uneconomical to litigate individually."); *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980) ("The financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the 'private attorney general' for the vindication of legal rights. . . ."). In class actions, an individual plaintiff rarely has a sufficient stake to pay a lawyer on an hourly basis to litigate a claim. Thus, in addition to the factors discussed above, the Court finds that the public policy effect of an award of attorneys' fees in this type of case should be considered. The complexity, difficulty, and social importance of class actions call for the most able counsel obtainable. A large segment of the public would be denied effective representation—and thus a remedy—in class actions if the fees awarded to successful counsel do not fairly compensate coun-

sel for the services provided, the serious risks undertaken, and the long delay before compensation is received. Thus, the Court finds that the public policy considerations here support the plaintiffs' counsels' fee request.

(17) Plaintiffs' counsel have also requested that they be reimbursed for ten thousand dollars (S 10,000.00) in expenses incurred in prosecuting this matter. Based on the evidence submitted, the Court finds that, during this litigation, plaintiffs' counsel has borne the expenses necessary to prosecute this action effectively for the benefit of plaintiffs and the class, and to reach the settlement. The award of expenses to counsel who create a common fund is appropriate. *In re Cat ish Antitrust Litigation*, 939 F. Supp. 493 (ND. Miss. 1996) (awarding costs and expenses in addition to the percentage fee); *In re SmithKline Beckman*, 751 F. Supp. 525, 534 (E.D. Pa. 1990); *Spicer v. Chicago Board of Options*, 844 F. Supp. 1226 (N.D. Ill. 1993). As shown through plaintiffs' counsels' submitted affidavits, plaintiffs' counsel have incurred such expenses totaling ten thousand dollars ($10,000.00). For all the reasons set forth in this order, the Court finds that an award to plaintiffs' counsel of such expenses is warranted and should be made.

GOOD CAUSE APPEARING, THE COURT HEREBY ORDERS, FINDS, CONCLUDES, ADJUDGES AND DECREES THAT:

1. This Court has jurisdiction over the subject matter of this litigation and all claims raised therein and, for the purpose of this Order of Final Approval and Final Judgment, over the parties to the Settlement and all of the Settlement Class Members. This Court is a proper and convenient venue for the adjudication of this Action, and for consideration, approval and administration of this Settlement.

2. This Court hereby approves in its entirety the Stipulation and the Settlement set forth therein and finds, con-

cludes, adjudges and decrees that the Preliminary Approval Order of the Court dated April 6, 2004, is hereby modified and, to the extent inconsistent herewith vacated, as follows:

(a) Inasmuch as (1) the Settlement Class is so numerous that joinder of all members in impracticable; (2) there are questions of law or fact common to the members of the Settlement Class which predominate over any questions affecting only individual members; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the Settlement Class; and (4) the representative parties have fairly and adequately protected the interest of the Settlement Class, the Action is hereby certified as a class action, with the named plaintiffs as class representatives and their counsel as class counsel, pursuant to Rules 23(a) and 23(b)(3) of the Alabama Rules of Civil Procedure, with respect to the Settlement Class consisting of all persons (including the named plaintiff) in Alabama or Georgia who at any time in the Class Period, purchased or renewed a certificate of group health insurance from United Wisconsin Life Insurance Company that provided coverage to that individual and/or his or her family, excluding: (a) any holders of certificates of insurance whose insurance coverage through United Wisconsin Life Insurance Company at all times has been issued solely as small employer group coverage or under any other employer sponsored group health plan; (b) persons presently in a bankruptcy proceeding; (c) persons that have pending against one or more of the named defendants on the date of the Court's certification order any individual action wherein recovery sought is based in whole or in part on the type of claims asserted in this Action; (d) persons who, as to a particular defendant, have previously obtained a judgment or settled any claims against that same defendant concerning the type claim asserted herein or have previously executed releases, releasing any such claims against the same defendant; (e) persons who own a policy of insurance with any defendant that is part of or related in any way to an employee

welfare benefit plan, pension plan or any similar type plan that is governed by the ERISA statutes; and (f) persons currently serving as a judge or justice of any federal court in Alabama or Georgia (the "Settlement Class"). Under no circumstances shall this order be deemed precedent in any form for the future certification of any class action against defendants.

(b) The Stipulation and Settlement are the product of substantial, good faith, arm's length negotiations of the Settling Parties, and are in all respects, fair, just, reasonable, and adequate to the Settlement Class and its members and should be and hereby are approved. The Court hereby certifies this settlement class pursuant to Rule 23(a) and (b)(3) of the Alabama Rules of Civil Procedure.

(c) Plaintiff and all Settlement Class Members shall, as of the Effective Date, conclusively be deemed to have released and forever discharged the defendants and Released Parties from all Released Claims.

3. This Court hereby dismisses, on the merits and with prejudice, in favor of each and all of the. Released Parties, each and every claim as defined or described in Article III of the Stipulation (the "Released Claims"), with each of the parties bearing only such attorneys' fees and costs as are set forth in the Stipulation and as may be awarded by the Court.

4. Plaintiff and all Settlement Class Members are fully and forever barred and permanently enjoined from asserting either individually, representatively, or on behalf of any class or person, or in any other capacity, any and all Released Claims against any and all of the Released Parties.

5. The Releases, as described and set forth in the Stipulation are, on the Effective Date, rendered and declared fully effective and enforceable. On the Effective Date, plaintiff and each of the members of the Settlement Class shall be deemed to have fully, finally and forever released and discharged the

defendants and the Released Parties with respect to any and all of the released Claims, as defined in the Stipulation.

6. All persons and entities (including all parties to this Action) are permanently barred and enjoined from filing or prosecuting any claim against any of the defendants or other Released Parties to recover damages arising out of the Released Claims.

7. Without affecting the finality of this Order of Final Approval and Judgment in any way, the Court hereby reserves and retains jurisdiction over the consummation, implementation, and administration of the Settlement, including the payment of attorneys' fees and expenses as awarded hereunder.

8. Neither the Settlement Agreement nor the Settlement, nor this Order of Final Approval and Judgment, nor any act performed or document executed, or Order entered, pursuant to or in furtherance of the Settlement Agreement, the Settlement of this Order of Final Approval and Judgment: (a) is or shall be deemed to be, or shall be, used as evidence of, or an admission of, the validity of any claims for or damages to the Settlement Class, or of any wrongdoing by or liability of any of the parties to the Settlement or Released Parties whatsoever; (b) is or shall be deemed to be or shall be used, in any action, proceeding or otherwise, as evidence of, or an admission of, any fault or omission of or by any of the parties to the Settlement or Released parties in any statement, release, or written document or financial report issued, filed or made; (c) shall be offered or received in evidence against any of the parties to the Settlement of Released Parties in any civil, criminal , administrative or other action or proceeding in any court, administrative agency, arbitration or other tribunal other than such proceedings as may be necessary to consummate or enforce the Settlement Agreement, the Settlement, the releases pursuant thereto and/or this Order of Final Approval and Judgment; provided, that the Stipulation and the

Exhibits thereto, and this Order of Final Approval and Judgment or any Order entered pursuant hereto or thereto may be filed or otherwise offered as evidence or utilized by any of the Defendants or any Released Parties in this Action or in any other or subsequent action or proceeding involving any of the Defendants or Released Parties in order to support a defense, claim, counter-claim or argument of any such defendants or Released Party of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction or any other theory of claim or issue preclusion, or any similar defense, claim, counter-claim or argument.

9. The Court recognizes that the parties have entered the Stipulation of Settlement and Compromise for settlement purposes only, and neither the fact of, nor any provision contained in the Stipulation of Settlement and Compromise nor any action taken under the Stipulation of Settlement and Compromise shall constitute, be construed as, or be admissible in evidence as, any admission of the validity of any claim or any fact alleged by plaintiff in this Action or in any other pending or subsequently filed action or of any wrongdoing, fault, violation, of law, or liability of any kind on the part of the defendants, or admission by defendants of any claim or allegation made in this Action or in any action, or admission by any of the plaintiff, members of the Settlement Class, or plaintiff's Class Counsel, of the validity of any fact or defense asserted against them in this Action or any other action. The Stipulation of Settlement and Compromise shall, however, be admissible in any action or proceeding to enforce the terms of the Stipulation of Settlement and Compromise.

10. The Stipulation of Settlement and Compromise is without prejudice to the rights of defendants to (a) oppose class certification in this Action should the Stipulation of Settlement and Compromise not be approved by the Court or implemented for any reason; (b) oppose certification in any other proposed or certified class action; or (c) use certifica-

tion of the Settlement Class to oppose certification of any other proposed class arising out of or related to the claims asserted in this Action.

11. In the event that this Order of Final Approval and Judgment does not become final or the Settlement otherwise does not become effective in accordance with the terms of the Stipulation, this Order of Final Approval and Judgment, except as to this paragraph, shall be rendered null and void and shall be vacated *nunc pro tunc*, the Settlement shall be terminated pursuant to the terms of the Stipulation (except as to those provisions thereof which are therein expressly stated to survive in such event), and the parties to the Settlement shall be deemed to have reverted to their respective status and position in this Action as of the date immediately preceding the date of the Settlement and as further provided in the Stipulation.

12. This Court determines that the persons listed on the attached Exhibit A have excluded themselves from the Settlement Class, and are not Settlement Class Members. Their Claims, if any, are not determined or affected by this Order of Final Approval and Judgment.

13. Based on the Court's findings above regarding plaintiffs' counsels' request for an award of attorneys' fees and expenses, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the sum of two million five hundred thousand dollars ($2,500,000) as attorneys' fees is awarded to class counsel and shall be paid by defendants collectively, in accordance with the Stipulation, to Beasley, Allen Crow, Methvin, Portis & Miles, P.C. and Lowe, Grammas, Hitson & Dana, LLP, attorneys for the class. The expenses often thousand dollars ($10,000) are also awarded and shall be paid by defendants directly to Beasley, Allen Crow, Methvin, Portis & Miles, P.C.

14. This Court determines that there is no just reason for delay of the entry of this Order of Final Approval and Judgment because this Order fully disposes of all claims of the Settlement Class against all defendants and Released Parties. Accordingly, the Court hereby directs entry of this Order of Final Approval and Judgement of Dismissal with Prejudice as final judgment.

DONE this 29th day of September, 2004.

/s/ Johnny Hardwick
JOHNNY HARDWICK
Circuit Judge

No. 05-921

IN THE

# Supreme Court of the United States

ANGELA KING, VALERIE ASKEW, CHARLES J. KAHN, JANA HUTCHINSON, and SHARON HENDERSON,
*Petitioners*,

v.

VIVIAN GADSON, UNITED WISCONSIN LIFE INSURANCE COMPANY, AMERICAN MEDICAL SECURITY, *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the Alabama Supreme Court**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

This opposition is being filed on behalf of Defendants American Medical Security, Inc., United Wisconsin Life Insurance Company (collectively n/k/a "American Medical Security Life Insurance Company"), and AmSouth Bank. During the proceedings below, American Medical Security, Inc. and United Wisconsin Life Insurance Company were acquired and became wholly owned subsidiaries of PacifiCare Health Systems, Inc., which was subsequently acquired by UnitedHealth Group, Inc. No publicly held company owns 10% or more of UnitedHealth Group Inc., a publicly held company. 100% of the stock of AmSouth Bank is owned by AmSouth Bancorporation, a publicly held company. No publicly held company owns 10% or more of AmSouth Bancorporation.

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IN THE

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v.

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**On Petition for a Writ of Certiorari to the Alabama Supreme Court**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents AMERICAN MEDICAL SECURITY, INC., UNITED WISCONSIN LIFE INSURANCE COMPANY AND AMSOUTH BANK respectfully submit this opposition to Angela King, Valerie Askew, Charles J. Kahn, Jana Hutchinson, and Sharon Henderson's (collectively, "Petitioners") Petition for Writ of Certiorari.

## I. INTRODUCTION.

The petition should be denied because this Court does not have jurisdiction and also because there is no disputed issue of federal or constitutional law.

As shown in section III, *infra*, the Court lacks jurisdiction because the petition does not identify any federal constitutional issues raised and addressed by the Alabama Supreme Court or the trial court.

Further, as shown in section IV, *infra*, even if the Court has jurisdiction, the petition should be denied because it relies on arguments that were either waived in the courts below (because Petitioners did not raise them), or that were considered and rejected based on fact findings by the trial court. Indeed, after conducting two evidentiary hearings, the trial court made detailed fact findings which are directly contrary to the assertions in the petition.

Finally, as also shown in section IV, *infra*, the petition should be denied because there was no due process violation in connection with the approval of the settlement as to Georgia class members.

None of the factors warranting certiorari under the rules of this Court is present. Petitioners have not identified any split between the circuits, nor have they identified any issue of federal or constitutional law. Indeed, Petitioners' appeal to the Alabama Supreme Court asserted that the trial court's approval of the settlement violated Alabama state law. The Alabama Supreme Court unanimously rejected this claim, affirming the trial court's order without a written opinion (a decision which carries no precedential value under Alabama law). Thus, even if the inflammatory claims in the petition were true (which they are not), this case would not warrant certiorari because it involves a dispute over whether the trial court's fact findings were correct and not any unresolved legal or constitutional issues.

## II. COUNTERSTATEMENT OF FACTS.

### A. The *Gadson* Complaint.

On June 11, 2002, Vivian Gadson ("Gadson") filed a complaint in Alabama state court against American Medical Security, Inc., United Wisconsin Life Insurance Company, and AmSouth Bank (collectively, "Defendants"). The complaint alleged that the Defendants used an illegal methodology to set renewal premiums for a health insurance plan.

Defendants asserted in the trial court that Gadson lacked standing because the insurance policy was issued in the name of her son. However, discovery revealed that Gadson purchased the insurance for her son and paid the premiums. The trial court found that Gadson had standing and was an adequate class representative. *See* § IV.A, *infra*. The petition asserts that Gadson's alleged lack of standing and inadequacy as a class representative constitute due process violations, even though Petitioners did not raise these issues in the trial court (and even though the trial court made fact findings to the contrary).

On March 10, 2004, after extensive discovery and motion practice, and after lengthy settlement negotiations, the parties submitted a proposed settlement to the trial court. The settlement was valued at approximately eleven million dollars. *See* Petitioners' Appendix ("Pet. App.") D, 36a.

On March 15, 2004, five days after the settlement was presented to the trial court, counsel for Petitioners herein filed a new class action in Georgia state court that made the same allegations as this case but limited to Georgia class members.

### B. The Preliminary Settlement Order.

On April 6, 2004, the trial court entered an Order: "(1) Accepting Stipulation of Settlement and Compromise Pending Fairness Hearing; (2) Certifying Temporary Settlement Class;

(3) Approving Class Notice; and (4) Setting Schedule for Consideration of Proposed Settlement at Fairness Hearing" (the "Preliminary Order"). Respondents' Appendix ("Resp. App.") A. The Preliminary Order defined the Settlement Class as "all persons and entities (including the named plaintiff) in Alabama or Georgia who, at any time purchased or renewed in Alabama or Georgia a certificate of medical insurance from United Wisconsin Life Insurance Company." *Id.* at 2a. The Preliminary Order required the parties to take numerous traditional steps to protect the interests of the absent class members and approved the parties' proposed "Notice of Class Settlement," which would be mailed to more than thirty thousand known class members by first-class mail and also published in ten prominent periodicals in both Alabama and Georgia.

The notices explained that each class member had the option to either remain in the class and be bound by the final judgment, or to opt out of the class and not be bound. Pet. App. D, 19a. Petitioners' counsel then sponsored an advertising campaign encouraging class members to opt out of the settlement.[1]

The trial court subsequently approved a minor language clarification in the class definition.[2] Although Petitioners now assert that this constituted a due process violation, they did not object to it in the trial court and provide no arguments for why it was prejudicial.

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[1] *See* Pet. App. D, 32a (noting "[Petitioners'] attorneys admitted at the fairness hearing that they engaged in an extensive television advertising campaign to educate both Alabama and Georgia class members and to solicit objectors and opt-outs.").

[2] The trial court's clarification in the class definition is described in section IV.B, *infra*. The substance of this clarification (necessary because of the common practice of a parent buying insurance for a child or family member) is not relevant to any federal or constitutional issues.

The deadline for class members to opt out or object to the settlement was August 19, 2004. Out of approximately thirty thousand (30,000) class members, 462 opted out and five objected. Pet. App. D, 20a-21a. Over 98% of the class members accepted the benefits of the settlement.

### C. The Fairness Hearing.

On September 8, 2004, the Alabama trial court conducted a fairness hearing, during which Petitioners opposed the settlement. The trial court allowed Petitioners' counsel to argue and present evidence. The trial court found that Ms. Hutchinson and Ms. Henderson had withdrawn their motion to intervene; that Mr. Kahn's objections were untimely; and that Ms. King lacked standing. The trial court noted that only Ms. Askew had standing to object—that is, one single objection out of 30,000 class members.[3]

Petitioners' arguments to the trial court primarily focused on the allegation that the requirements of Ala.R.Civ.P. 23 were not met because Georgia law was allegedly superior to Alabama law regarding the claims encompassed in the settlement. Thus, Petitioners claimed that the settlement was insufficient for Georgia class members. However, it is undisputed that the trial court applied the correct law to the analysis of this issue. The trial court issued an order that it would apply Georgia law to the Georgia class members in accordance with *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). *See* Resp. App. B, 9a.

Petitioners attempted to demonstrate that Georgia law was superior to Alabama law with an expert witness, who testified at the fairness hearing. However, Petitioners' expert admitted

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[3] The trial court also noted that "[s]uch a low number of objectors in and of itself is evidence that this settlement is fair, adequate, and reasonable." Pet. App. D, 32a (*citing Ass'n For Disabled Americans v. Amoco Oil Co.*, 211 F.R.D. 457, 467 (S.D. Fla. 2002)).